**Why is it so difficult to combat elder abuse and, in particular, financial exploitation of the elderly?**

**By : Donald Poirier and Norma Poirier**

LAW COMMISSION OF CANADA
COMMISSION DU DROIT DU CANADA

103-04653/

# Why is it so difficult to combat elder abuse and, in particular, financial exploitation of the elderly?

By : Donald Poirier and
Norma Poirier

This paper was prepared for the Law Commission of Canada under the title *Pourquoi est-il si difficile de lutter contre la violence envers les aînés et en particulier contre l'exploitation économique dont ils sont victimes?* The views expressed are those of the authors and do not necessarily reflect the views of the Commission. The accuracy of the information contained in the paper is the sole responsibility of the authors. For more information on the Law Commission's work, visit the web site at www.lcc.gc.ca

Ce document est également disponible en français sous le titre *Pourquoi est-il si difficile de lutter contre la violence envers les aînés et en particulier contre l'exploitation économique dont ils sont victimes?* Pour consulter les travaux de la Commission du droit, visitez le site Internet à l'adresse www.cdc.gc.ca

**Final Report**

# Why is it so difficult to combat elder abuse and, in particular, financial exploitation of the elderly?

by

**Donald Poirier, M.A (Psy.), LL.B., LL.M., LL.D.**
**and**
**Norma Poirier, B.Sc.N., M.A.(Ed.), M.N., Ph.D.**
**Professors at the University of Moncton**
**Moncton, N.B., E1A 3E9**
**tel: (506) 863-2128**
**fax: (506) 858-4534**
**E-mail: Poiriedo@umoncton.ca**

**Submitted to the Law Commission of Canada**

**July 17, 1999**

# Table of Contents


BRIEF BIOGRAPHIES OF THE AUTHORS ..... vi

SUMMARY ..... vii

INTRODUCTION ..... 1

PART I: THE PREVALENCE OF ELDER ABUSE ..... 3

1. Introduction ..... 3
2. Origin of the Notion of Elder Abuse ..... 3
   - 2.1 Knowledge of the problem at the time of the adoption of elder protection laws: scarcity of data ..... 3
   - 2.2 Canadian data on elder abuse at the time of the adoption of elder protection laws ..... 4
3. The Remedy: the Adoption of Laws to Protect the Elderly and Abused Adults ..... 5
4. The Prevalence of Elder Abuse ..... 6
   - 4.1 Types of abuse ..... 6
   - 4.2 Problems inherent to studies of elder abuse ..... 6
   - 4.3 The overall prevalance rates of elder abuse ..... 7
     - 4.3.1 Surveys of professionals ..... 7
     - 4.3.2 Prevalence studies based on the files of service agencies ..... 7
     - 4.3.3 Studies using a random sample ..... 8
5. Physical and Sexual Assault ..... 8
   - 5.1 Definitions ..... 8
   - 5.2 Prevalence rates ..... 8
   - 5.3 Abusers and victims ..... 9
6. Psychological Abuse ..... 10
   - 6.1 Definitions ..... 10
   - 6.2 Prevalence rates ..... 10
   - 6.3 Abusers and victims ..... 10
7. The Prevalence of Neglect ..... 11
   - 7.1 Definitions ..... 11
   - 7.2 Prevalence rates ..... 11
   - 7.3 Abusers and victims ..... 11
8. The Prevalence of Loss of Rights ..... 12
   - 8.1 Definitions ..... 12
   - 8.2 Prevalence rates ..... 12
   - 8.3 Abusers and victims ..... 13
9. The Prevalence of Financial Exploitation of the Elderly ..... 13
   - 9.1 Definitions ..... 13
   - 9.2 Prevalence rates ..... 13
   - 9.3 Abusers and victims ..... 14
10. Conclusion ..... 14

PART II: EVALUATION OF THE ADEQUACY AND EFFICACY OF CANADIAN LAW IN ADDRESSING ELDER ABUSE ..... 17

1. Introduction ..... 17
2. Methodology ..... 17
   - 2.1 Determining the state of the law ..... 18
   - 2.2 Evaluating the adequacy of the law ..... 18
   - 2.3 Evaluating the efficacy of the law ..... 18
3. The Relevant Law in effect in Canada, and in the Atlantic provinces in particular .. 19
   - 3.1 The relevant provisions of the *Criminal Code* ..... 19
     - 3.1.1 Physical and sexual abuse ..... 19
     - 3.1.2 Chronic psychological abuse ..... 20
     - 3.1.3 Neglect ..... 20
     - 3.1.4 Loss of rights ..... 20
   - 3.2 The relevant provisions of Canadian common law and Quebec civil law .. 20
     - 3.2.1 Physical and sexual abuse ..... 21
     - 3.2.2 Chronic psychological abuse ..... 21
     - 3.2.3 Neglect ..... 21
     - 3.2.4 Loss of rights ..... 22
   - 3.3 The relevant provisions of laws governing guardianship of the elderly ..... 22
     - 3.3.1 The laws governing guardianship ..... 22
     - 3.3.2 The parens patriae jurisdiction of the Superior Court ..... 23
     - 3.3.3 The laws protecting the mentally ill ..... 23
   - 3.4 The relevant provisions of the laws governing protection of the elderly and abused and/or neglected adults ..... 24
4. Evaluation of the adequacy and efficacy of the law governing protection of the elderly from abuse ..... 24
   - 4.1 Criteria for evaluating each of the 5 forms of elder abuse ..... 24
   - 4.2 Evaluation of the adequacy and efficacy of the various elements of Canadian law governing physical and sexual assault and chronic psychological abuse ..... 25
     - 4.2.1 The adequacy of the law ..... 25
     - 4.2.2 The efficacy of the law ..... 28
   - 4.3 Evaluation of the adequacy and efficacy of the various elements of Canadian law governing protection of the elderly from neglect..... 31
     - 4.3.1 The adequacy of the law ..... 31
     - 4.3.2 The efficacy of the law ..... 33
   - 4.4 Evaluation of the adequacy and efficacy of the various elements of Canadian law governing protection of the rights of the elderly ..... 34
     - 4.4.1 The adequacy of the law ..... 34
     - 4.4.2 The efficacy of the law ..... 37
5. Conclusion ..... 38

PART III: THE CONSTRUCTION OF A CONCEPTUAL FRAMEWORK TO EXPLAIN WHY IT IS SO DIFFICULT TO COMBAT FINANCIAL EXPLOITATION OF THE ELDERLY ..... 40

1. Introduction ..... 40
2. Reasons for the ineffectiveness of the law in protecting the elderly ..... 40
   2.1 Reasons related to the inadequacy and ineffectiveness of traditional law ... 40
      2.1.1 Mandatory reporting ..... 41
      2.1.2 Considerable powers granted to social workers ..... 41
   2.2 Institutional reasons ..... 44
      2.2.1 Systemic discrimination: ageism ..... 44
      2.2.2 Police ..... 44
      2.2.3 Lack of resources ..... 45
   2.3 Reasons related to family values ..... 45
      2.3.1 To avoid hurting their children ..... 45
      2.3.2 Shame and guilt ..... 45
      2.3.3 Quality of life ..... 46
      2.3.4 Leave something to the children ..... 46
3. Methodology ..... 46
4. Results ..... 47
   4.1 The state of Canadian law with regard to financial exploitation of the elderly ..... 47
      4.1.1 The relevant provisions of the *Criminal Code* ..... 47
      4.1.2 The relevant provisions of Canadian common law and Quebec civil law ..... 48
      4.1.3 The relevant provisions of the laws governing guardianship of the elderly ..... 48
      4.1.4 The relevant provisions of the laws governing protection of the elderly and abused and/or neglected adults ..... 49
   4.2 Evaluation of the adequacy and efficacy of the law in protecting the elderly from financial exploitation ..... 49
      4.2.1 The inadequacy of elements of Canadian law ..... 49
         4.2.1.1 The provisions of the *Criminal Code* ..... 49
         4.2.1.2 The provisions of common law and the *Civil Code of Québec* ..... 51
         4.2.1.3 The laws governing guardianship and trusteeship ..... 51
         4.2.1.4 Special legislation to protect the elderly ..... 52
      4.2.2 The ineffectiveness of the elements of Canadian law ..... 54
         4.2.2.1 The efficacy of criminal law ..... 54
         4.2.2.2 The efficacy of Canadian common law and Quebec civil law ..... 54
         4.2.2.3 The efficacy of the laws governing guardianship and of mental health laws ..... 56
         4.2.2.4 The efficacy of laws to protect the elderly ..... 57

5. A Conceptual Framework to Explain the Phenomenon: Normative Pluralism ..... 57
5.1 Normative pluralism in interpersonal relationships ..... 57
5.2 The normative pluralism of social structures ..... 58
5.2.1 Boaventura de Soussa Santos' cartography of social systems ..... 59
5.2.2 Luhmann's social systems ..... 59
5.2.3 Interaction between the various social systems: the rationality specific to each ..... 60
5.3 The application of normative pluralism to the problem of protection of the elderly from financial exploitation by their descendants ..... 61
5.3.1 The State legal system ..... 61
5.3.2 The professional social system ..... 62
5.3.3 The familial social system ..... 64
5.3.4 Interaction between the various social systems to protect the elderly from financial exploitation ..... 64
6. Recommendations: How to Effect Change in the Protection of the Elderly from Financial Exploitation ..... 65

GENERAL CONCLUSION ..... 68

SUMMARY OF RECOMMENDATIONS ..... 70

BIBLIOGRAPHY ..... 73

LIST OF LEGISLATIVE SOURCES ..... 85

LIST OF CASES ..... 86

LIST OF TABLES

Table 1 Evaluation of the adequacy and efficacy of Canadian law in protecting the elderly from physical and psychological abuse ..... 27

Table 2 Categorization of cases referred to Nova Scotia's Social Services from 1986 to 1995 ..... 30

Table 3 Evaluation of the adequacy and efficacy of Canadian law in protecting the elderly from neglect ..... 32

Table 4 Evaluation of the adequacy and efficacy of Canadian law in protecting the elderly from loss of their rights ..... 36

Table 5 Comparative table of the powers granted to the police under the *Criminal Code* and those granted to social workers under New Brunswick's *Family Services Act* ..... 43

Table 6 Evaluation of the adequacy and efficacy of Canadian law in protecting the elderly from financial exploitation ..... 53

## BRIEF BIOGRAPHIES OF THE AUTHORS

DONALD POIRIER is a lawyer and law professor at the University of Moncton Law School.

Before practicing law, he studied at the University of Moncton where he obtained a Masters degree in psychology. He worked as a social development officer for Community Improvement Corporation in Bathurst for three years before attending UNB Law School where he graduated with a law degree in 1976. He began to practice law as a Crown prosecuter.

He has been a law professor since the opening of the University of Moncton Law School in 1978. He obtained a Masters degree in law from McGill University and a Doctorate in law from the Université de Montréal. As a law professor he has written 11 books and more than 60 articles in professional journals. He was director of the University of Moncton Centre on the study of aging from 1991 to 1994. His main fields of research and writing are the rights of elders and family law. Since 1993, he has been also teaching magistrates in Cameroun, Haiti and France.

NORMA POIRIER is a nurse and associate professor at the School of Nursing of the University of Moncton.

She has been teaching nursing in New Brunswick since 1972, first in the diploma schools of nursing in Bathurst and Moncton. Since the phasing out of the diploma schools of nursing by the provincial government in 1996 she has been teaching at the University of Moncton`s School of Nursing.

She obtained her PhD in 1999. Besides completing her Bacchelor in Nursing, she has earned two masters degrees, one in education and one in Nursing, together with certificates in psychiatric nursing, gerontology and religious science. Her main fields of practice are psychiatric and geriatric nursing. She has published a dozen articles in professional journals, most of them on terminally ill elders.

## Summary

The scientific community and the population as a whole are now aware that financial exploitation is the most common form of elder abuse. Yet, helping professionals continue to present all forms of elder abuse as a single problem similar to that of child abuse, with physical abuse and emotional or social neglect being its main characteristics.These professionals have therefore passed over in silence financial exploitation and have proposed legislative solutions modelled on child protection laws, notably those of the Atlantic provinces.

The authors of this report have undertaken to analyse why it is so difficult to effectively combat elder abuse, particularly the financial exploitation of the elderly. They do so in three stages. Firstly, the authors analysed the adequacy of the different components of Canadian law in this regard (provisions of the *Criminal Code*, of common law and of Quebec civil law, and of special legislation applicable to the elderly). They conclude that the Canadian law currently in effect is adequate to combat the various forms of elder abuse, including financial exploitation. Secondly, they analysed the efficacy of the various components of Canadian law in combatting elder abuse, notably, financial exploitation. They conclude that the relevant components of Canadian law are ineffective mainly with regard to financial exploitation.

Thirdly, the authors construct a conceptual model to answer the question: "Why is it so difficult to effectively combat elder abuse and, notably, financial exploitation of the elderly?" In the conceptual context of normative pluralism, three hypotheses are proposed to explain the problem: the inadequacy of legal norms; the ineffectiveness of the professional standards of social workers; and the resistance of familial norms. After analysing the available empirical data, the authors conclude that each social system is driven by its own logic, which is not necessarily compatible with that of the others. Now, according to Luhmann's theory of social systems, each social system is self-referential and can be defined only by itself and not by the others around it. Thus, while the social professions have succeeded in having adopted elder protection laws modelled on child protection, the social logic within these laws may well conflict with that of the *Canadian Charter of Rights and Freedoms* and be declared inoperative. Moreover, within the professional social system, social workers have redefined the problem of elder abuse as a single problem having a single solution other than those provided in the *Criminal Code*, thereby discrediting the work done by the police to combat elder abuse. Finally, the greatest challenge lies in the fact that the social system of the family is closed to the influence of social workers and, notably, to police intervention. Until traditional police and judicial law enforcement measures are shaped according to the logic of the social system of the family, the struggle against elder abuse, notably financial abuse of the elderly, is doomed to fail.

In order to succeed, the measures used, notably the alternative measures provided by the *Criminal Code* and in civil proceedings, must be more in keeping with the values of the familial social system.

## INTRODUCTION

Normally, the relationships of dependence and interdependence between the elderly and their family circle should not raise more problems for or responses from the legislator than the same relationships all Canadian citizens maintain with each other. Since no individual is an island floating on the sea of humanity, every single person has relationships of both dependence and interdependence with those around them. That is why helping relationships are so important.

In this late 20th century, we are living in a complex society whose members have become specialized in earning their living and providing to others services those others are unable to provide for themselves, either because they are not entitled to—because of professional monopolies—or because they do not have sufficient knowledge. In this sense, every citizen, not just the elderly, must maintain relationships of dependence with the professionals who provide health, protection, and other social services.

Children—especially before they reach adolescence—are especially dependent on others. It is no longer any surprise these days that the State has some supervision over children, to ensure that they receive the care and education they need to become autonomous individuals capable of being productive in their society. According to Jacques Donzelot (1977) and Elizabeth Badinter (1980), it was in the mid-19th century that this type of "family police" came into being. This type of monitoring of the family came into being more or less everywhere towards the late 19th century with the adoption of laws to prevent child cruelty and mechanisms for taking custody of abused children.

About one hundred years later, most American states and Canada's four Atlantic provinces have adopted elder protection laws modelled on those in effect to counter child abuse. What logic has prompted us, a hundred years later, to apply to the elderly the same legislative solutions as applied to children? Unlike children, the elderly are legally competent. It is estimated, in fact, that only about 5 to 6% of the elderly population has senile dementia (Bergman, 1980). Elder protection laws therefore abandon the classic criteria established thus far, namely, legal and mental capacity, to the new criterion—risk of harm.

It is only when they had lost their legal capacity or were, in fact, incapable of understanding the nature and consequences of their actions that a person was not held liable for their wrongful acts. While it was François Ewald (1986) who explained the process whereby fault liability was shifted to an insurance company, it was Robert Castel (1981) who demonstrated the shift from accountability to risk management in humans.

The substitution of the social risk of wrongdoing for legal or mental incapacity as the criterion warranting State intervention bears troubling consequences. Thus, the notion of the inviolability of the human person, which served as the rampart against State intervention, is giving way to that of the best interest of persons, with intervention taking precedence over laisser-faire. According to this new approach, the best interest of persons compels, in fact, that measures be taken, even against their will, to protect them from dangers they refuse to see. In legislating to bring about this reversal of principle, the legislator takes secular rights away from

certain groups of citizens deemed weak or incapable of defending themselves, and therefore exposed to risk of injury. In so doing, he gradually erodes the principle of inviolability in the name of protection from social risk of injury.

Laws to protect the elderly or disabled therefore constitute one of the first expressions of the systematic replacement of the concept of legal or mental incapacity with that of social risk as a criterion for dependence on State protection. Until recently, in fact, the notion of legal or mental incapacity was only invoked to justify intervention against an individual's consent.

The problem of protection of the elderly from abuse and neglect entails five presuppositions. The first is that the elderly need special protection, above and beyond the existing laws, because they are either more subject to neglect, or less capable of defending themselves, than adults under age 65. The second presupposition is that elderly people who are neglected, like children, have relationships of dependence on the people who care for them. The third presupposition is that the abuse to which the elderly are likely to be subjected falls into a single category, unlike the different categories stipulated in the *Criminal Code*—offences against the person and offences against property—and in other laws adopted over the centuries (laws governing guardianship and trusteeship, protection of the mentally ill, etc.). The fourth presupposition is that the current law is inadequate or ineffective in addressing elder abuse and that special statutes modelled on child abuse laws therefore need to be adopted. Finally, the fifth presupposition is based on a mistrust of the family, which is perceived to be the main source of elder abuse. Also, the proposed legislative solutions suggest an overconfidence in the social professions, which are deemed fit not only to diagnose social problems, but also to resolve them in the best interest of those with whose protection they have been entrusted.

This report is divided into three parts. Part I will attempt to verify, based on empirical data gathered by the researchers, whether it is true that the elderly are more subject to abuse than other adult citizens. It will also explore the different types of abuse and neglect to which the elderly are especially vulnerable, in order to determine the veracity of the second presupposition. Part II will attempt to address the presuppositions about the inadequacy and ineffectiveness of the current rules of law in addressing the epidemic of elder abuse. It will therefore be devoted to an examination of the adequacy and efficacy of the various sectors of the law (criminal law, commom law/civil law, special legislation) in addressing the various types of elder abuse, excluding financial exploitation. Part III will attempt to answer the question: "Why is it so difficult to effectively combat elder abuse and, notably, financial exploitation of the elderly?" In addition to assessing the adequacy and efficacy of legislative measures for combatting the financial abuse of the elderly, a conceptual framework will be presented which will attempt to answer the question. Finally, the general conclusion will contain recommendations for attempting to counter elder abuse.

## PART I: THE PREVALENCE OF ELDER ABUSE

### 1. Introduction

This first part of the report will be devoted to verifying, based on the empirical data gathered by the researchers, whether it is true that the elderly are more subject to abuse than other adult citizens. It will also explore the various types of abuse and neglect to which the elderly are especially vulnerable, to determine the veracity of the presupposition that elder abuse is similar to child abuse. Finally, empirical data about the victims and their abusers will allow us to determine the veracity of the presupposition that, like children, elderly persons who are abused have relationships of dependence with their abusers.

### 2. Origin of the Notion of Elder Abuse

#### *2.1 Knowledge of the problem at the time of the adoption of elder protection laws: the scarcity of data*

The first ones to raise the problem of protection of the elderly seems to be those who were concerned about problems related to administration of the affairs of seniors who, because of physical or mental disability, were unable to look after their own affairs, such as endorsing their veterans', disability or old age pension cheques (Hall, 1971). It is from this perspective that the law governing the legally incapacitated was reformed in France in 1968 (Atias, 1985, p. 125-213; Massip, 1983) and that the Americans first attempted to find legal solutions regarding guardianship and trusteeship (Schmidt et al., 1981, p. 7-23). It was also this perspective that prompted the development of the *Dependant Adults Act* adopted by Alberta in 1976 (McLaughlin, 1979, p. 17-22). In addition, it can be said fairly reliably that it is problems related to the administration of the affairs of the elderly that were at the origin of the new Quebec legislation, largely inspired by French law (Quebec, 1989, p. 34-35).

Most authors agree as to the benefits of a law similar to that of Alberta to resolve long-term problems of substitution of the consent of incapacitated persons, a population largely made up of older adults (Fram, 1987; Gamache and Milette, 1987; p. 183-185; Hughes, 1989; Sharpe, 1983-84). This substitution of consent concerns not only the consent to legal transactions for managing the person's assets, but also the consent to ordinary everyday transactions. To this substitution of consent, some authors have wanted to add services designed to protect the elderly from abuse (Regan, 1972).

Alongside administrators and those primarily concerned about the problems related to the property management and everyday activities of incapacitated persons, there developed, at about the same time, studies by social workers interested in the problem of elder abuse. The authors of these studies began with the premise that elder abuse is comparable to child abuse. Congresswoman Mary Rose Oakar (1983), of the U.S. House of Representatives, was the first to table a bill for "the prevention, identification and treatment of adult abuse". In reviewing American federal legislation to protect the elderly, she reported that this issue was first raised in February 1978 at the hearings of the congressional subcommittee on violence and domestic

abuse. Dr. Suzanne Steinmetz expressed the view that the number of abused seniors probably equalled the number of abused children and women. It was following this statement that the congressional committee on the physical and psychological abuse of the elderly was struck, in 1979. Most of the testimony lamented the lack of knowledge about this phenomenon of abuse, but each referred to cases taken from the files of their respective agency to illustrate the phenomenon.

One of the researchers considered to be the most reliable with respect to domestic abuse is critical of this type of knowledge, which he describes as the "woozle effect" (Gelles, 1985, p. 358; Gelles and Straus, 1988, p. 39-40). The author writes that where domestic abuse is concerned, researchers have shaped our understanding of the problem somewhat in the way of Winnie-the-Pooh and Piglet who, following their own tracks, thought they were hunting down a monster until they noticed it was their own footprints they were following.

It should be pointed out that at the time Newfoundland's legislation was being enacted (1973) and the New Brunswick elder protection bill was being drafted (about 1979), very few American and no Canadian studies of the phenomenon of elder abuse were available. The first Canadian study on the subject was published by Shell in 1982. The supporters of the provisions to protect the elderly were not primarily concerned about the problems of substitution of consent, but rather, it seems, only about the problem of elder abuse.

### *2.2 Canadian data on elder abuse at the time of the adoption of elder prrotection laws*

Despite the concerns of caregivers, the phenomena stressed by New Brunswick and Nova Scotia community workers were not those of the physical abuse of the elderly by their children. The abuse that was publicly denounced was that committed by the staff of nursing homes (Coughlan et al., 1995, p. 51; Poirier, 1993, 1997, p. 86). One Quebec study also reveals that institutionalized seniors are physically abused and neglected as often by nursing staff as are seniors living with relatives (Bélanger et al., 1981).

There was also much talk of the financial exploitation of the elderly by their children (Coughlan et al., 1995, p. 51). Cases were reported of seniors who had assigned their assets to their children in return for a promise that they would support their parents until their death, and who had been thrown out of their homes once the transfer had taken place. In one study of all reported cases of financial exploitation of the elderly over a 100-year period, Poirier (1984) reported that 54% of all reported decisions in English Canada on the matter were in New Brunswick and Nova Scotia.

Writing about the events leading to the adoption of elder protection legislation in Nova Scotia, Paul Girard (1988, p. 45-46) writes that the main motive for the neglect and abuse of the elderly is the lure of gain.

However, despite the interventions of seniors and caregivers who defined the problem in terms of abuse in nursing homes and financial exploitation, a document published by the New Brunswick Ministry of Social Services (Hickey, 1981) just prior to the coming into force of the

law, reported an increase in the number of families comprising elderly persons and the consequent greater risk of elder abuse. The legislative provisions were therefore apparently introduced to prevent the risk of physical, sexual and mental abuse of elderly persons who have become dependant on their child, usually a daughter. The other reason that would seem to be behind introducing the legislation was to provide for intervention in the case of seniors left to fend for themselves.

## 3. The Remedy: the Adoption of Laws to Protect the Elderly and Abused Adults

The protection of the elderly is a notion that dates back several hundred years. It was usually confused with that of the protection of incompetent or incapacited persons of legal age. However, for the past two decades, the problem of elder abuse has caused much ink to flow.

The law did not remain indifferent to this debate in the 1980s; virtually all the American states adopted laws designed specifically to protect the elderly, as did Canada's four Atlantic provinces. The western provinces, Ontario and Quebec also amended their legislation governing the guardianship of persons of legal age to protect, among others, elderly adults who become incapacitated.

There are two competing trends in the legislation to protect incapacitated persons. On the one hand, the traditional romanist countries, including the European nations and Quebec, prefer to keep a law that is of general application and subject to the general principle whereby adults are presumed competent and incapacity must be shown before they lose their rights. The notion of incapacity may, however, be broadened to take in temporary or partial incapacity; legal protective systems are therefore provided for these categories of persons. This trend, inspired by civil law tradition, places its trust in the family of the incompetent and stresses the protection of the human rights conveyed by the charters of rights.

In contrast, the Anglo-Saxon countries, influenced by the United States, stress laws designed specifically to protect the elderly or disabled. These laws are based on a mistrust of the family, which is perceived as the main source of abuse. Moreover, this legislative solution suggests an overconfidence in the social professions, which are deemed fit not only to diagnose social problems, but also to resolve them in the best interest of those with whose protection they have been entrusted.

The laws governing the protection of the elderly or disabled adopted by the Atlantic provinces are often modelled on those of the American states, and apply also to physically or mentally infirm adults. While Newfoundland's legislation in this regard dates back to 1973 (*Neglected Adults Welfare Act*), it is the provisions governing the protection of the elderly contained in New Brunswick's *Family Services Act* (ss. 34-42), enacted in 1980, that have served as the model for the other Maritime provinces. The Nova Scotia lawmaker imitated New Brunswick in adopting the *Adult Protection Act* in 1985, and Prince Edward Island followed suit in 1988 when it passed its *Adult Protection Act*. Unlike the legislation of the two other Maritime provinces, the provisions of New Brunswick's *Family Services Act* (1980, ss. 34-42) distinguish the elderly from other adults. Consequently, while the latter fall under the protection of the Act

only if they are physically or mentally infirm, elderly persons over age 65 are automatically covered by the Act solely by virtue of their age. The acts of the Atlantic provinces stipulate that if social workers suspect an elderly person is unable to care for himself or refuses to take measures to ensure the care he needs or is an adult who is or could become a victim of abuse, sexual assault or mental cruelty, they must investigate and may request a medical examination, even against the person's will. If the person refuses to follow the recommendations of social workers, a court order may be obtained to force him to comply (MacDonald, Hornick, Robertson and Wallace, (1990); Gordon and Verdon-Jones, 1992).

## 4. The Prevalence of Elder Abuse

Systematic studies based on random samples to determine the prevalence of elder abuse date back to the late 1980s, that is, several years after the statutes to protect the elderly and incompetent adults were enacted.

### *4.1 Types of abuse*

All studies of elder abuse and neglect bring out the difficulty of studying the prevalence of this problem. The first difficulty lies in the definition of abuse and neglect.

The notion of elder abuse and neglect comprises several categories of abuse. Some studies confine themselves to three categories: physical abuse, chronic verbal abuse, and neglect (Pillemer and Finkelhor, 1988); others add a fourth category, financial abuse or exploitation (Podnieks and Finkelhor, 1990). Still others add a fifth category, loss of rights, notably in long-term care facilities (Bourland, 1990 cited by Vida, 1994; Poirier, in press; Poirier and Thériault, 1993).

### *4.2 The problems inherent to studies of elder abuse*

Besides the crucial problem of a consistent definition of what is meant by the various types of abuse, other problems arise when researchers attempt to determine the prevalence rate of elder abuse. The critics have pointed out three main problems.

One of the main problems is to obtain a homogeneous population for purposes of comparative study. Some studies are of older adults over age 65, while others include persons age 55 or 60 and older. This makes it difficult to compare the prevalence rates.

A second problem has to do with the fact that some studies ask elders whether they have been abused since age 55, 60 or 65, while others, notably those done of random samples, ask whether they were abused in the 12 months before the survey.

Finally, studies of the prevalence of elder abuse fall into three categories: those using a random sample; those based on a population using social or medical services; and finally, those in which people—usually professionals—are asked whether they know of elderly persons who have been abused or neglected. It is often misleading to go by the figures cited by studies done of

professionals or agencies specializing in elder abuse, since the figures provided by these agencies are biased in favour of the type of interventions they provide.

### *4.3 The overall prevalence rates of elder abuse*

#### *4.3.1 Surveys of professionals*

The first category of studies was that of studies in which professionals were asked whether they knew of cases of elderly persons who had been abused. The study that received the most attention is undeniable that of O'Malley and his colleagues (1984), which emphasizes acts of abuse against the elderly perpetrated by the relatives who care for them. The vast majority of the studies that came after that of O'Malley used the same methodology, which consisted in asking various social workers whether they had ever known of cases of abuse of seniors perpetrated by those caring for them. The Canadian studies by Shell, done in Manitoba (1982), and by Stevenson (1985), done in Alberta, followed this methodology (Fattah and Sacco, 1989, p. 230-232).

Bond and Penner (1995) did a survey on the perception professions have of elder abuse. A survey was mailed out to 174 Canadian and American professionals likely to have seniors who had been abused among their clientèle. There were 99 (60.7%) responses. The authors concluded that for professionals, the perception of its prevalence depends on the conception each professional has of his role and situation (p. 133). Poirier (1993) drew the same conclusions when studying the processes of adoption and implemention of the elder protection laws in force in the Atlantic provinces.

Such studies therefore does not provide an overview of prevalence rates. At best, they make it possible to verify the perception professionals and/or the general population have of the phenomenon of elder abuse.

#### *4.3.2 Prevalence studies based on the files of service agencies*

The prevalence of the phenomenon of elder abuse may also be estimated based on the study of the files of various agencies that provide services to the elderly. These may be health or social service agencies, agencies whose purpose is to receive complaints of abuse, or even police departments.

In Australia, Kurrle, Sadler and Cameon (1992) studied the files of patients over age 65 living at home and referred to a geriatric rehabilitation centre attached to a major hospital. Over a one-year period, the rate of abuse, all categories combined, was 4.6%. It should be noted that the authors found there were multiple incidents of abuse in 1.8% of the sample.

Neale, Hwalek, Goodrich and Quinn (1996) studied the cases of abuse reported in the state of Illinois over a 27-month period (October 1989 to December 1991). They found that 3,727 cases of abuse were reported, of which 2,577 were confirmed following an investigation.

In Canada, Dow-Pittaway and Westhues (1993) did a study of 605 adults over age 55 who had contacted health and social service agencies in London, Ontario. Three hundred and eighty-seven persons (78%) participated. When asked whether they had been abused since reaching age 55, 19% reported having been subject to some form of abuse since age 55 or older. Bunge and Levelt (1998) studied the 1996 police statistics for crimes against persons. They write that "[i]n 1996, elderly adults accounted for 2% of the victims of violent crimes reported to police" (p. 25) [translation].

### *4.3.3 Studies using a random sample*

Pillemer and Finkelhor (1988) were the first to do a survey based on a random sample of 2,000 elderly persons over age 65. In this survey, the researchers asked the participants whether they had experienced various forms of abuse in the 12 months prior to the survey. Overall, 3.2% of the sample reported having been abused. This study did not look at financial exploitation. Sijuwade (1995) reports that the prevalence rate of elder abuse measured over the previous 12 months is about 5% virtually everywhere in the world. He also reaches this conclusion for the U.S., had financial exploitation been included in the American study.

Podnieks and Pillemer (1990) used the same methodology for a random sample of 2,000 Canadians over age 65. The researchers found that about 4% of respondents experienced one of the types of abuse in the 12 months before the interview.

Sijuwade (1995) reports that Ogg (1993) used the same approach with 2,000 adults in the United Kingdom, of whom 593 were age 65 or older, and found that about 5% of the population had been abused verbally, 2% financially, and 2% physically. Sijuwade also refers to a study done in Norway by Kivela (1992) which found that the prevalence of elder abuse was 5%—2.5% for men and 7% for women.

## 5. Physical and Sexual Assault

### *5.1 Definitions*

The first category of abuse includes physical and sexual abuse. This category is inherited directly from child protection. However, it may also derive from physical spousal abuse. In fact, when it comes to defining the terms, it is usually the behaviours used to assess the prevalence of spousal abuse that are used, notably: threats of physical violence; being struck with the hand or fist; being struck with an object, with a knife or weapon; being injured with a firearm.

### *5.2 Prevalence rates*

The studies done since the late 1980s have shown that physical and sexual assault are indeed experienced by the elderly. Thus, Pillemer and Finkelhor (1988) found that 2% of citizens over age 65 said they had been physically abused in the year prior to the survey. The Australian study by Kurrle et al. (1992), which reviewed the files of patients over age 65 living at home and referred to a geriatric rehabilitation centre attached to a major hospital, found that over a one-

year period, 2.1% had been physically abused. Ogg (1993) found that 2% of the English population had been physically abused.

In Canada, Podnieks and Pillemer (1990) estimated that 0.5% of Canadians age 65 or older had been physically assaulted in the year before the survey. Although Bunge and Levelt (1998), in analysing the 1996 police statistics, conclude that in 1996, elderly adults accounted for 2% of victims of violent crimes reported to the police, they estimate that 20% of all violent crimes against persons age 65 or older were committed by family members, children and spouses accounting for the majority of those accused in these cases (44% and 34%, respectiveley) (p. 25). Dow-Pittaway and Westhues (1993), for their part, found that 14.3% of patients over age 55 who had contacted social and health services in London, Ontario, had been physically abused since the age of 55.

### *5.3 Abusers and victims*

Numerous studies on spousal abuse show that about 10% of women are physically assaulted each year (Statistics Canada, 1998). Regardless of the prevalence rate for physical assault in the general population, it must be noted that physical abuse is far less prevalent among the elderly than among younger age groups. According to the study by Podnieks and Pillimer (1990), the elderly are 20 times less subject to domestic violence than are women generally. However, if we recall that 2% of seniors are victims of physical abuse, they would still be 5 times less subject to physical abuse than the general population.

Physical abuse of the elderly is largely attributable to domestic violence. Gelles and Straus (1988, p. 63) write that a broad study by Pillemer and Finkelhor (1988) of 2,000 elderly persons in the Boston area shows that near two-thirds of abused elders were abused by their spouse. Podnieks and Pillemer (1990) also concluded that "in most cases, the abuser was the spouse" (p. 44). The 1996 police statistical data analysed by Bunge and Levelt (1998) revealed that "20% of all crimes of violence against persons age 65 or older were committed by family members, children and spouses accounting for the majority of the accused in these cases (44% and 34%, respectively)" (p. 25) [translation]. On the other hand, these authors write that in 1996, police statistics showed that "elderly men are more often abused by their children (59%), while in the case of elderly women, the accused was usually a spouse (42%), followed by children (37%)" (p. 26) [translation].

Moreover, contrary to the results of some studies done based on the files of social agencies, the study of a random sample conducted by Podnieks and Pillemer (1990) states that "consistent with previous research, the study found no relationship between being a victim of physical violence and various indicators of health and functional status. That is, victims of physical violence were not more likely to report that their health was poor, or that they had difficulty performing everyday activities." (p. 44). Finally, contrary to the presuppositions of some social workers, the study by Podnieks and Pillemer (1990), like that of Pillemer and Phikelhor (1988), shows that the victims are not dependent on their abusers. On the contrary, "nearly three in five abusers were 'very dependent' or 'somewhat dependent' financially on the victim." [translation]. In fact, the victims of physical abuse are half as dependent on their abusers

as are elderly people who are not abused, since "of the people who suffered no abuse, only about one third of the respondents reported having someone who depended on them a lot or a little" (p. 65) [translation].

## 6. Psychological Abuse

### *6.1 Definitions*

The notion of elder abuse also includes the category of psychological or social mistreatment. Psychological or emotional mistreatment actually denotes chronic verbal abuse. This form of abuse is much more like the psychological violence referred to in studies of spousal abuse than the emotional deprivation suffered by some children.

Psychological mistreatment, often called psychological or emotional abuse, may be considered an extension of the psychological, social or emotional abuse often suffered by children. Chronic psychological abuse, however, is much more like elements found in the literature on domestic violence against women.

### *6.2 Prevalence rates*

The epidemiological studies mentioned earlier all provide data on chronic psychological abuse. Pillemer and Finkelhor (1988) report that 1.1% of Bostonians age 65 or older reported having been verbally abused in the year before the survey. Ogg (1993) reports that about 5% of the English-speaking population age 65 or older has been verbally abused. The Australian study by Kurrle et al. (1992) reports that 2.5% of seniors living at home and referred to a geriatric rehabilitation centre over a one-year period had been victims of psychological abuse.

Podnieks and Pillemer (1990) report that 1.4% of Canadians age 65 or older admitted having been verbally abused in the year prior to the survey. Moreover, Dow-Pittaway and Westhues (1993), in their study of individuals who had sought help from a social agency in London, Ontario, report that 14.5% said they had been subjected to chronic psychological abuse since age 55. Finally, in a study of the case files of a local community service centre (LCSC) over a one-year period, Beaulieu, Gravel and Lithwick (1999, February) write that 90 (70%) of 128 files showed the presence of psychological violence.

### *6.3 Abusers and victims*

Chronic psychological abuse is certainly present and even more common than physical abuse. This type of violence must, however, be interpreted in light of a lengthy relationship between spouses or between parents and children. Like the physical abuse of the elderly, studies have shown that chronic psychological abuse occurs principally between spouses. In fact, Podnieks and Pillemer (1990) state that "the victims of chronic verbal abuse were married and the abuser was their spouse" (p. 49) [translation]. The authors state that "despite the fact that the victims had some health problems, they were autonomous in terms of their everyday activities" (p. 49) [translation]. The authors of the study again state that the victims of chronic verbal abuse

did not seem any different from others in terms of their social support systems, employment status, income or mother tongue (Podnieks andPillemer, 1990, pp. 54-55).

## 7. The Prevalence of Neglect

### *7.1 Definitions*

There are many difficulties when it comes to defining neglect. Podnieks and Pillemer (1990) write that there is no consensus on a precise definition of this category. Despite this, they write that "there appears to be general agreement that the intentional failure of a clearly designated caregiver to meet the needs of an elder constitutes neglect" (p. 4). This notion is one developed essentially with regard to child abuse.

The notion of neglect is difficult to define. Like the notions of physical and sexual assault and psychological or emotional abuse, the notion of neglect derives from an idea that the elderly are like children who must be cared for and who are therefore vulnerable to neglect by their natural caregivers. Coughlan et al. (1995) vehemently object to such infantilization of the elderly.

### *7.2 The prevalence rates*

The data from systematic studies establish that neglect is a category difficult to identify. Pillemer and Finkelhor (1988) report that 0.4% of the sample of abused Bostonians said they had been a victim of neglect in the year before the survey. The study by Podnieks and Pillemer (1990) of a random sample of Canadians age 65 or older reveals precisely the same prevalence rate of 0.4%. The authors caution, however, against drawing hasty conclusions "given the small number of cases identified, and the difficulties in differentiating the presence or absence of this form of mistreatment" (p. 50).

However, studies based on data from health and community service agencies give a completely different picture. The Australian study by Kurrle et al. (1992) shows that 1.4% of patients over age 65 living at home and referred to a geriatric rehabilitation centre had been victims of neglect. Neale et al. (1996) report that of the 3,727 cases of elder abuse reported in the state of Illinois over a period of 27 months (October 1989 to December 1991), 33% were cases of neglect, of which 66% were confirmed. Dow-Pittaway and Westhues (1993) find that 16.4% of adults over age 55 who had contacted health and social service agencies in London, Ontario, said they had suffered neglect since the age of 55. Finally, Beaulieu, Gravel and Lithwick (1999) estimate that of the 128 cases of LCSC intervention over an entire year, 41 (32%) showed the presence of elder neglect.

### *7.3 Abusers and victims*

Podnieks and Pillemer (1990) found that all victims of neglect but one were women. The abuser was either a family member (spouse, daughter or daughter-in-law) or caregivers from outside the family. In fact, "shopping, meal preparation and housework were the most common

activities in which assistance was withheld" (p. 50). The authors of the study found no difference between persons who say they are neglected and others for most variables, including the variables pertaining to social support. However, the authors found two distinguishing characteristics of seniors who say they have been neglected. Firstly, nearly two thirds of elderly people who said they were neglected were widowed. Secondly, "one major difference among the two groups is that the victims were much more physically impaired and functionally dependent than the general elderly population. Victims were much more likely to report that their health was poor (50% compared to 8%)" (p. 51).

The picture that emerges from the data from social service interventions in Nova Scotia is, moreover, surprising, since about 15% of the cases appear to be cases of neglect by natural caregivers. In contrast, nearly two thirds of all cases reported to social services are cases of self-neglect (Coughlan et al., 1995, p. 52; Poirier, 1997, p. 157). Coughlan et al. (1995, p. 52) explain that by the time cases reach the courts, all other cases have been settled and only cases of self-neglect remain to be considered by the courts.

## 8. The Prevalence of Loss of Rights

### *8.1 Definitions*

Loss of rights is rarely mentioned in prevalence studies. It is in fact a category that affects especially older persons who live in a long-term care facility or are terminally ill. The violation of rights includes failure to respect their physical integrity (treatment despite their refusal to consent to treatment) and privacy (Poirier and Thériault, 1993).

### *8.2 The prevalence rates*

Except for the study by Podnieks and Pillemer (1990) which explores the abuse of elderly Canadians living at home, very little research has yet been done on the prevalence of the abuse of seniors living in a care facility (hospitals, nursing homes, boarding houses) and representing 8 to 10% of the total population of seniors. Now, some authors are interested only in the problem of abuse within this population. Although the absence of physical abuse is taken for granted, cases of abuse are reported (Bélanger, Darche, De Ravinel and Grenier, 1981; Beaulieu, 1994).

The failure to respect the rights of the residents of these care facilities is common. The right to privacy obviously poses a problem in common law provinces in particular (Poirier and Thériault, 1993). The right to autonomy, especially with regard to treatment (consent to and refusal of treatment) is, moreover, systematically violated in hospital settings especially. In-depth studies, notably in the United States (Teno et al. 1997a, 1997b), but also in Canada (Wilson, 1997), have shown that in spite of laws authorizing a person to execute a valid power of attorney (agency) (living will) even when that person becomes incompetent, nearly half of patients died in suffering and with treatment they had refused (Lewin, 1996).

### *8.3 Abusers and victims*

It goes without saying that the people most often affected by lack of respect for their rights in hospitals and extended care facilities are the elderly in the terminal phase of an illness. The abusers are usually physicians who refuse to respect the patient's right to refuse treatment. Because of the limited research done in this area, we do not yet have systematic and comprehensive information about the extent to which rights are violated and the effect this has on the quality of life of elderly patients.

## 9. The Prevalence of Financial Exploitation of the Elderly

### *9.1 Definitions*

Financial exploitation of the elderly is sometimes known as "material abuse" or "financial abuse." This category covers situations in which the assets or financial resources of the elderly person are stolen or mismanaged.

### *9.2 Prevalence rates*

Although financial exploitation was not included in the questionnaire of the first study done of a random sample by Pillemer and Finkelhor (1988), it has been included in nearly all subsequent studies. It is generally accepted today that financial exploitation is the most widespread form of elder abuse. The study done by Podnieks and Pillemer (1990) of a random sample of 2,000 Canadians age 65 or older noted that 2.5% reported having been the victim of financial exploitation. The English study by Ogg (1993) of 2,000 adults, of whom 593 were age 65 or older, also found that 2% of the elderly population said they had been the victim of financial exploitation.

Moreover, when the files of agencies are consulted, the figures vary somewhat, but there is one constant: financial exploitation remains the type of abuse most often complained of by the elderly. Thus, Neale et al. (1996) found that, of the cases reported to the authorities of the state of Illinois over a period of 27 months, 49% were cases of financial exploitation, and of these, 66% were confirmed after the survey. Baron and Welty (1996) cite a study done in 1990 in which the City of New York reviewed 800 cases of elder abuse reported to the Elderly Crime Victims Resource Center over a 24-month period (January 1987 to January 1989). Financial exploitation was the most common form of abuse, even though in two thirds of the cases the victim had suffered a combination of neglect, financial exploitation and physical or psychological abuse.

The latest Canadian studies show that 40 to 60% of all cases of elder abuse take the form of financial exploitation (Shell, 1982, p. 80; Stevenson, 1985, p. 16). The study by Podnieks and Pillemer (1990) shows that financial exploitation accounts for 60% of all cases of elder abuse. The study by Dow-Pittaway and Westhues (1993) of adults over age 55 who had contacted health and social service agencies in London, Ontario, reports that financial exploitation was the most common form of elder abuse. In a study done by Spencer (1996) in British Columbia of a random sample of 200 people age 60 or older, 8% said they had been in situations that could be

described as financial exploitation since age 60. The most common forms of financial exploitation involved coercion, harassment or fraud, while abuse of a power of attorney was the most common form of financial exploitation [sic]. Moreover, 20% of all financial exploitation involved real estate transactions (mortgages to be paid by a family member; transfer of assets).

### *9.3 Abusers and victims*

Recent studies show that there is no significant difference between the elderly who are financial exploited and other elderly persons. In fact, Podnieks and Pillemer (1990) wrote that, contrary to some claims by social workers, the elderly people who were financially exploited were not more socially isolated than other elderly people. However, a larger proportion of victims of financial exploitation were widowed, divorced, separated or never married. In one random study of 200 seniors age 60 or older in British Columbia, Spencer (1996) also found that the victims of financial exploitation were not more dependent or vulnerable than other adults. Contrary to the claims of social workers, it also found that the victims were not more naive or more trusting than other adults. Spencer (1996) maintains, however, that when the elderly person is physically dependent on the abuser, the financial exploitation may be more serious. Rowe, Davies, Baburaj and Sinha (1993) had also noted in a study in which 25 patients of reduced mental capacity were interviewed, that it is easy for guardians to control the money and financially exploit, notably through powers of attorney, old people whose mental faculties are in decline.

The authors of the study by Podnieks and Pillemer (1990) concluded that "abusers were more likely to be distant relatives or non-relatives, rather than close relatives" (p. 36). In fact, in 40% of cases, the financial abusers were friends, neighbours or acquaintances; in 24% of cases, they were distant relatives, such as cousins, grandchildren, nieces, nephews. Only in 29% of cases were the abusers sons or daughters. Spencer (1996, pp. 35-40) maintains that for there to be financial exploitation, three elements must be present: (1) the abuser must need money or be inclined towards financial exploitation; (2) an opportunity must present itself; and finally, (3) the abuser often feels somewhat entitled to the coveted property, either because he or she has performed services for the elderly person, or because he or she will eventually inherit the property.

## 10. Conclusion

The purpose of this first part of the report was to shed some light on the actual situation regarding the various types of elder abuse. This shedding of light on the issue has become necessary because a number of presuppositions have been, and still are, conveyed by social workers. Moreover, it is these presuppositions that have influenced the laws adopted in Canada's four Atlantic provinces and have led to the adoption of laws modelled on those in effect to counter child abuse.

With regard to the first presupposition conveyed by social workers—to the effect that people age 65 or older need special protection because they are either more subject to abuse or less able to defend themselves from abuse than adults under age 65—the scientific data gathered

in several countries, and especially Canada, firmly contradict this presuppostion. In fact, not only are the elderly not more subject to abuse than other age groups; they are actually 5 to 20 times less subject to physical abuse than younger women and young men.

Furthermore, the theory advanced by social workers that abused seniors, like children, have relationships of dependence on the people who care for them, is also challenged by the scientific studies done of random samples. These studies in fact show quite the opposite. Far from being dependent on their abusers, it is these abusers who are usually dependent on the elderly they abuse! Yet many social workers continue to perpetuate the myth of the dependence of seniors, especially abused seniors.

The third presupposition to the effect that elder abuse falls into a single category, along the lines of child abuse, is also challenged by scientific studies of random samples of people age 65 or older. Chronic physical and psychological abuse of the elderly are in fact completely different from the emotional unavailability suffered by children. The scientific data show that the physical or psychological abuse is actually spousal abuse, as in most cases it is the spouse who is the abuser. Even though physical and psychological abuse of the elderly are similar in some respects to child abuse, they are clearly distinguished by the fact that they involve abuse between adults living as a couple, and furthermore, unlike in the case of children, it is the abusers who are usually dependent on their victims! It would therefore make more sense to compare the physical abuse of the elderly to spousal abuse, rather than to child abuse.

The scientific data from random samples of elderly populations show that, contrary to the claims of social workers, it is impossible to treat the different types of elder abuse as a single form of abuse as in the case of child abuse. Child abuse, while it is far from one-dimensional and uniform, is nevertheless characterized by acts of abuse or neglect that are harmful to the child's development. In the case of elder abuse, five elements distinguish it from child abuse. Firstly, in most cases of physical or psychological abuse of the elderly, contrary to child abuse, it is the abusers, rather than the victims, who have problems of dependence. This assertion challenges the myth of the battered woman who is financially dependent on her spouse. However, recent studies of battered women show that these women are not necessarily dependent, but very often independent, persistent and resourceful (Campbell, 1989, Stark and Flitcraft, 1996; Walker, 1983). Secondly, unlike children abused by their parents, elderly victims of abuse and their abusers are couples; there is therefore no abuse of a child whose development is threatened, but rather spousal abuse. Thirdly, financial exploitation, which represents the most common form of elder abuse, is quite unknown to youth protection workers. Fourthly, the cases of neglect reported in the scientific studies of elder abuse differ, for the most part, from situations of child neglect. Government data in fact show that the vast majority of cases of neglect are actually cases of self-neglect, that is, of elderly persons who, being mentally incompetent, refuse the solutions social workers want to impose on them. Now children, particularly the youngest, are not at all in a position to refuse—or accept, for that matter—the services their parents provide for their protection. Elderly people who are admitted to hospitals or long-term care facilities because they cannot be cared for at home are in no way comparable to children. Children are no longer placed in orphanages or institutions. Finally, terminally ill seniors who have all their mental faculties certainly cannot be compared to minor children who have an incurable disease.

One of the arguments in favour the elderly being treated the same as children was doubtless based on a prejudice in the form of distrust of the family, perceived as the main source of the abuse. Also, the proposed legislative solutions suggest an overconfidence in the social professions, which are deemed fit not only to diagnose social problems, but also to resolve them in the best interest of those with whose protection they have been entrusted.

In the last chapter of their book, Fattah and Sacco (1989) examine the need to implement policies geared specifically to the need to protect the elderly. They ask outright: Is it necessary to develop policies designed specifically to protect the elderly, given that they suffer less abuse than other groups in society? The authors answer, with which we concur, as do McDonald, Hornick and Robertson (1990) and Coughlan et al. (1995), is that in gearing our policies to the elderly, we risk losing sight of the fact that the elderly are far less likely to be victims of abuse than are people in other age groups. Moreover, with respect to physical abuse, mistreatment of the elderly is usually inflicted in the context of the family and should not be isolated from the overall problem of domestic abuse.

The next part will be devoted mainly to studying the adequacy and efficacy of the various elements of Canadian law in addressing the different forms of elder abuse. Also, the other assumptions that have informed the elder protection laws will also be analysed in light of the evaluation of the law.

## PART II: EVALUATION OF THE ADEQUACY AND EFFICACY OF CANADIAN LAW IN ADDRESSING ELDER ABUSE

### 1. Introduction

At the time the United States and Atlantic provinces were enacting elder protection laws, there were no scientific studies on the prevalence of elder abuse. Two decades later, credible data are available on the prevelance of the various forms of abuse most commonly committed against the elderly. Consequently, it is now possible to evaluate the adequacy and efficacy not only of the traditional elements of Canadian law relating to the different kinds of elder abuse, but also of the laws aimed specifically at protecting this population.

The previous part concluded by showing that many myths conveyed by some professionals who work with the elderly have been seriously challenged by the data of scientific studies. As the special elder protection laws adopted by Canada's Atlantic provinces are based on presuppositions whose bases have been seriously weakened, an evaluation is warranted. At the end of this millennium, it is essential to evaluate the adequacy and efficacy of all elements of Canadian law in force for combatting the various types of elder abuse.

A brief description of the methodology used to evaluate the adequacy and efficacy of the law in this regard is followed by a description of the different areas of law applicable to the fight against the various forms of elder abuse. The last section concerns the evaluation of the adequacy and efficacy of the various elements of Canadian law regarding the different kinds of elder abuse. Financial exploitation will not be discussed in this part, but will be dealt with in Part III of this report.

### 2. Methodology

In the context of the law, evaluating means qualitatively and quantitatively assessing the value of a set of legal norms by comparing the observable characteristics against established norms, in order to yield data useful to decision making in pursuit of an objective (Legendre, 1988, p. 254). With regard specifically to the present study, the evaluation will consist in judging qualitatively the value of the legal norms in effect in the various areas of Canadian law that apply to protection of the elderly from the various forms of abuse discussed in the previous part, notably, physical and sexual assault, chronic psychological abuse, neglect, loss of rights.

Working from the assumption conveyed by many professionals who work with the elderly that current Canadian law is inadequate or ineffective in countering elder abuse, a two-pronged approach is called for: to determine the state of the law, and to evaluate its adequacy and efficacy.

### *2.1 Determining the state of the law*

What is first called for is to determine the corpus to be evaluated. It is necessary, then, to begin by determining the state of the law with regard to protection of the elderly from (1) physical and sexual abuse; (2) chronic psychological abuse; (3) neglect; and (4) loss of rights.

It will therefore be necessary to describe briefly the provisions of each area of Canadian law applicable to each of the forms of abuse amply described in Part I of this report: (1) the relevant provisions of the *Criminal Code* of Canada, the main instrument adopted by the federal legislator for combatting violence generally; (2) the state of Canadian common law and Quebec civil law, since forms of recourse are provided for certain types of abuse which may be suffered by the general population; (3) the provincial laws governing the legal competence of the elderly to take decisions that affect them, notably, (a) the law governing guardianship and trusteeship, (b) the mental health laws; and (4) the elder protection laws adopted in the Atlantic provinces.

### *2.2 Evaluating the adequacy of the law*

After determining the state of the law with respect to the forms of elder abuse, it will be necessary to assess whether or not the provisions of Canada's *Criminal Code*, the civil law in Canada's common law provinces and in Quebec, and the special elder protection laws adopted by the Canadian provinces are sufficient for controlling the various types of abuse.

Any evaluation calls for the formulation of criteria against which the existing legal norms can be compared. The various areas of law will be considered adequate if they meet the following two criteria: (1) whether each particular sector of the law covers each of the types of abuse to be eradicated; (2) the constitutionality of the area of the law in question. If the law risks being declared unconstitutional, then its inadequacy goes without saying.

### *2.3 Evaluating the efficacy of the law*

Efficacy is the degree to which the objectives of a program are achieved or the degree to which a goal is attained. It is expressed as the result of comparing the desired objective and the results achieved (Legendre 1988, p. 222). In the words of Guy Rocher (1998), "the efficacy of a law seems to me to refer to the fact that it achieves the effect desired by its author or, if not, at least an effect that is in the direction desired by the author and not in conflict with it" (p. 135) [translation]. Thus, efficacy is expressed by measuring the discrepancy between the desired objective and the results achieved. This discrepancy may be expressed as a percentage, when it can be quantified, or it may be assigned a graduated descriptor, such as one finds in Likert scales, with possible efficacy ratings being: (A): very effective; (B): fairly effective; (C) somewhat effective; or (D): not very effective. Given the difficulty of quantifying the efficacy of laws, we have opted for a graduated qualitative evaluation, with four efficacy ratings.

The first step to take in any evaluation of the efficacy of the law is to determine the desired objectives through research. With respect to elder abuse, there may be multiple desired objectives, depending on the elements of law being considered. These objectives will be

described a little later when discussing each element of Canadian and Quebec law related to protection of the elderly from various types of abuse.

The second step is to gather information about the way in which the objectives are achieved using legal norms relevant to elder protection. In practice, as field studies could not be done because of the limited scope of this study, to get an overview of the efficacy of the relevant law it was necessary to rely on statistical data gathered by others. Thus, available police and judicial statistics were consulted. Provincial government reports on elder protection were also used. Finally, available field studies assessing the efficacy of the various areas of law were also used. They were obtained by consulting the following databanks: Legal Periodical Index, Ageline, Social Work Index, Sociological Index.

## 3. The Relevant Law in Effect in Canada, and in the Atlantic Provinces in Particular

Before evaluating the adequacy and efficacy of Canadian law in protecting the elderly against the various forms of abuse, it is important to describe briefly the relevant legal provisions. As mentioned earlier, this description of the law will cover four aspects: (1) the relevant provisions of the *Criminal Code* of Canada; (2) Canadian common law and Quebec civil law providing recourse to abused seniors; (3) special laws governing (a) guardianship and trusteeship, (b) protection of the mentally ill; and (4) special laws to protect the elderly and abused adults.

### *3.1 The relevant provisions of the Criminal Code*

The abuses committed against elderly citizens are not necessarily any different from those committed against other adults, especially women. In this regard, the provisions of the *Criminal Code* governing offences against persons and reputation as well as sexual offences are pertinent. Thus, generally speaking, the *Criminal Code* has three objectives. The first is, if not to eradicate abuse, then at least to limit it by deterring abusers and the public through the imposition of sanctions proportionate to the seriousness of the offence. The second is to protect the public from crimes against persons and against property. The third is to rehabilitate the offender. For some years, a fourth objective timidly appeared with the adoption, in 1995, of section 717 which provides for the use of alternative measures to facilitate, among other things, restitution.

#### *3.1.1 Physical and sexual abuse*

The results of studies of the physical abuse of the elderly establish that the elderly are usually victims of spousal abuse or even abuse by their descendants. Now, many provisions of the *Criminal Code* are aimed specifically at protecting individuals against physical abuse. As Gerald Robertson (1995) wrote in the chapter on physical abuse, one can rely on the provisions governing offences against persons, covering the whole range of assault, from simple assault (s. 265) through assault causing bodily harm (s. 267), aggravated assault (s. 268), unlawfully causing bodily harm (s. 269) and torture (s. 269.1), to attempt to commit murder (s. 239). Moreover, the *Criminal Code* covers the full range of sexual assault, from simple sexual assault

to aggravated sexual assault (s. 271-273), including sexual assault by a spouse (s. 278). Finally, subsection 279(2) of the *Criminal Code* prohibits the forcible confinement of a person, that is, keeping them in a place against their will.

### *3.1.2 Chronic psychological abuse*

Chronic psychological abuse is a form of verbal assault or mental cruelty against another person. The *Criminal Code* contains several provisions governing situations that might be qualified as chronic psychological abuse. Since 1993, the *Criminal Code* has been amended precisely to counter this type of spousal abuse. Section 264 prohibits engaging in conduct that causes another person reasonably to fear for their safety—this offence is called criminal harassment. Also, section 264.1 prohibits threatening a person with assault, destruction of personal or real property, or killing or injuring the animal of this person. Section 423 also prohibits anyone from intimidating a person by threats or harassment in order to compel them to do something against their will. Finally, section 810 allows any person who fears, on reasonable grounds, that another person will cause bodily injury or property damage to them or their next of kin, to lay an information against them before a judge. If the complaint is upheld, the judge may then order the defendant to enter into a recognizance. Such a recognizance is not considered an offence and does not appear in the defendant's crimimal record unless it is violated, which violation constitutes an offence (s. 811).

### *3.1.3 Neglect*

With regard to neglect, section 215 of the *Criminal Code* obliges a person to provide necessaries of life to a person under his charge if that person is unable, by reason of age, illness, insanity or other cause, to withdraw himself from that charge and provide himself with necessaries of life.

### *3.1.4 Loss of rights*

Obviously, the *Criminal Code* stresses the procedures that protect the rights of the accused. The *Canadian Charter of Rights and Freedoms* (1982, ss. 7-14) stipulates the many legal rights of the accused. If there is one area of law whose procedures are designed to protect the rights and freedoms of citizens, it is certainly criminal law. Nearly half the rulings of the Supreme Court of Canada have to do specifically with the protection of legal rights. Moreover, special provisions of the *Criminal Code* protect the privacy of citizens and provide strict procedures when the interception of private conversations must be permitted (ss. 183-196).

## *3.2 The relevant provisions of Canadian common law and Quebec civil law*

The objective of actions for tort is primarily to return the victim, to the extent that money can, to the same state in which they would have been had they not suffered certain kinds of abuse. As punitive damages are seldom awarded in Canada, the deterrent effect is secondary, but nevertheless significant when the person obliged to pay money damages risks losing a great deal, particularly if they are not insured.

### *3.2.1 Physical and sexual abuse*

As the common law with respect to physical and sexual abuse developed alongside the criminal law, it is therefore not surprising that the offences mentioned above are also sanctioned by various tort remedies. Civil lawsuits to obtain money damages may therefore be brought against the abusers. The same applies by virtue of the provisions of sections 10 (inviolability of the human person) and 1457 (tort) of the *Civil Code of Québec*.

Thus, those who commit assault, including sexual assault, are liable to be proceeded against in tort for assault under the principles developed by common law. It is then sufficient to prove that the abuser touched his victim without the victim's consent; there is no need to prove bodily or physical injury. The tort of forcible confinement may also be brought against someone who detains another or does not permit them to move about at will (Linden, 1997, pp. 42-52). Sections 10 and 1457 of the *Civil Code of Québec*, like Canadian common law, also allows civil actions in such cases, except bodily or moral harm must be proven (Baudouin and Deslauriers, 1998, pp. 107-108).

### *3.2.2 Chronic psychological abuse*

Chronic psychological abuse is not directly covered by Canadian common law, except when someone is threatened with assault (Linden, 1997, pp. 42-45). However, a right to sue has been recognized when someone intends to cause others moral suffering (Linden, 1997, pp. 52-55). The notion of telephone harassment has also been recognized by allowing a nuisance claim (Linden, 1997, pp. 55-59). The civil tort of trespassing may also be used when an individual refuses to leave the property of another. Such legal actions are also possible pursuant to section 1457 of the *Civil Code of Québec* (Baudouin and Delauriers, 1998, pp. 188-190).

### *3.2.3 Neglect*

The tort of neglect was, until recently, rarely used against relatives. However, for some years, certain individuals (notably, children and wives) have sued relatives for neglect of their duty to protect them when they were children. In one recent case, a child sued his mother for neglect for mishandling an automobile, injuring the child while he was still in the womb (*Dobson and Dobson*, 1997). The lawsuit was allowed by two New Brunswick courts before being rejected by the Supreme Court of Canada in a split decision *(Dobson (Litigation Guardian of)* v. *Dobson* (1999)). Women have also sued their mother for neglect of their duty to protect them against the sexual advances of the husband (DesRosiers and Langevin, 1998). It has also been recognized for some years that a tort action may be brought for neglect of one's duty as trustee, notably for failing in one's obligations towards one's dependants (*K.M.* v. *H.M.*, 1992). It is appropriate to note, however, that negligence or neglect of one's duty as trustee is not sufficient for the victim's case to succeed. The victim must have suffered bodily, physical, mental or financial harm.

### *3.2.4 Loss of rights*

Canadian common law, unlike American common law, does not provide much recourse against loss of rights. There is in fact no recourse in common law to protect intimacy and privacy. In Quebec, however, the Quebec *Charter of Human Rights and Freedoms* has been successfully invoked before the Supreme Court of Canada to protect intimacy and privacy (*Aubry* v. *Éditions Vice-Versa*, 1998). Some Canadian provinces (i.e., the western provinces) have adopted laws to protect privacy (Linden, 1997, pp. 55-59).

There is, however, one area of common law, and of civil law as well, that very clearly protects the rights of patients from imposed medical treatment. It is very clear, since the case of *Nancy B.* (1992), in both Quebec and the common law provinces, that a patient has the right to refuse any treatment, provided they have the mental competence to understand the nature of the treatment and the procedure. With the exception New Brunswick and Prince Edward Island, all provinces have now adopted laws authorizing a person to direct another to act for them in making decisions concerning treatment that they will be unable to make themselves (Gordon, 1995; Poirier, 1997, pp. 199-204).

## *3.3 The relevant provisions of laws governing guardianship of the elderly*

The aims of the laws governing guardianship and trusteeship were originally to protect those who become incapable of managing their affairs or their property. The new laws adopted by Alberta, Saskatchewan and the Northwest Territories are aimed, among other things, at providing better protection for people temporarily or partially incapable of managing their affairs or administering their property. As for the laws to protect the mentally ill, they are designed to protect people who have a mental illness and present a danger to themselves or others.

### *3.3.1 The laws governing guardianship*

With respect to guardianship and trusteeship, the common law legislative authorities too have made legislative provisions whose effects are similar to those of the civil codes. The first mention of legislation governing guardianship and trusteeship in English laws appears in a text entitled *De Prerogativa Regis*, whose text and date of adoption have been lost. This *Prerogativa Regis* has been imported to North America and is the precursor of the various laws governing the guardianship and trusteeship of incapacitated persons in common law (*Eve, re*, [1986]), some of which are still in effect in several Canadian provinces, notably New Brunswick (*Infirm Persons Act*, 1973), Nova Scotia (*Incompetent Persons Act*, 1989), and Prince Edward Island (*Mental Health Act*, 1988).

The laws governing guardianship and trusteeship have gone through three phases in their recent evolution. The first was in the mid-1970s, in Alberta, with the *Dependent Adults Act* (1976), joined by Saskatchewan (*Dependant Persons Act*, 1989) and the Northwest Territories (*Act respecting guardianship*, 1994). This legislation attempts to render the classic model far more flexible by reducing the burden of proof, allowing a guardian of the incompetent person to be appointed to help them in their day-to-day activities if they have difficulty managing on their

own, and allowing for the order to be reassessed from time to time. The second wave came in the early 1980s, and became established in the American states and Canada's Atlantic provinces. These jurisdictions leave the old classic legal model intact, but adopt laws governing the protection of the elderly and the disabled. The third wave came in the early 1990s. New laws combined both the social protection of vulnerable persons found in the laws governing guardianship, and the legal protections contained in the old model. Ontario led the way with the adoption of its *Act to provide for the making of decisions on behalf of adults* (1992), followed by British Columbia (*Adult Guardianship Act*, 1993), Manitoba (*Vulnerable Persons Living with a Mental Disability Act*, 1993), and Newfoundland (*Advance Health Care Directives Act*, 1995).

### *3.3.2 The parens patriae jurisdiction of the Superior Court*

The notion of *parens patriae* refers to the authority and obligation of the Monarch, then of the State, to care for the weak, notably children and people not of sound mind. This mission was delegated to the Chancellor, then to the Court of Chancery, where it has remained to this day. After the courts of equity merged with the common law courts, this jurisdiction was transferred to the courts of superior jurisdiction, which exercised the authority of both the Chancery and the common law courts (*Re Eve*, 1986, pp. 407-409). This jurisdiction has not been abolished by the different laws governing the protection of incapacitated persons. It remains dormant, however, when special statutes have been adopted. But if special legislation does not adequately protect incapacitated persons, the courts may resort to their *parens patriae* jurisdiction.

### *3.3.3 The laws protecting the mentally ill*

While the rights of the mentally ill have been better protected since the early 1970s than they were in 1890, the model of the *Lunacy Act* of 1890 has essentially been retained. There are four means of admitting patients to a specialized institution against their will. The most common method is referral to a physician who, after examining the patient, certifies that the individual has a mental illness serious enough that hospitalization proves necessary in the interest of the patient's own safety or the safety of others. A peace office who presumes that a person has a mental illness and, in the interest of their own security or that of others, should be examined, may take this person into custody and take them to an appropriate place for psychiatric examination. A judge to whom an application is made may order the examination of a person suspected of having a mental illness of a nature constituting a danger to that person or others. Finally, a presiding court judge who has reason to believe that the accused or the person found guilty of an offence has a mental disorder, may order this person to go to a psychiatric institution to undergo an examination (Robertson, 1994, p. 457).

Since the early 1970s in the United States and the late 1980s in Canada, the laws of the states and provinces of these two countries have been amended to comply with the constitutional requirements concerning the confinement. The new provisions regarding the protection of the mentally ill stipulate that when a person is admitted to a psychiatric institution, he must be examined as soon as possible and, in all cases, within 96 hours of being admitted. They may not

be confined there longer, unless a court orders them confined in order to undergo psychiatric treatment.

### *3.4 The relevant provisions of the laws governing protection of the elderly and abused and/or neglected adults*

Finally, the laws enacted by the Atlantic provinces to protect neglected adults are intended, like the *Criminal Code*, to protect the elderly from the various kinds of abuse.

Robert Castel (1981) estimates that our society has now passed the treatment phase and entered the prevention phase. This phase in the development of the protection of persons is no longer characterized primarily by intervention with a view to healing, but rather by policies of prevention that consist essentially in procedures of identification. Today's mental health experts are merely a tool for managing populations that proceeds without itself altering the subjects concerned.

From this perspective, most American states, followed by Canada's four Atlantic provinces, have adopted laws designed to protect elderly or disabled adults. These laws are intended, firstly, to overcome the shortcomings of the laws to protect incapacitated persons referred to earlier. These laws were intended to protect elderly people unable to care for themselves because of a physical or mental disability. However, adult protection laws go further, in that they are designed also to protect any elderly person or disabled adult who, regardless of their physical or mental capacity, refuses or is unable to take steps to provide the care and attention they need, or is slow to do so. Mental incapacity is no longer the main factor for determining intervention by a social worker.

Although Quebec has not adopted a specific act for the protection of elders and handicapped persons, section 48 of the Quebec Charter of Human Rights and Freedoms provides that "every aged and every handicapped person has the right to protection against any form of exploitation." Such a person also has a right to the protection and security that must be provided to him by his family or the persons acting in their stead. This section allows one to complain to the Quebec Human Rights Commission in cases of physical, sexual, or psychological abuses or negligence by parents (Gamache & Milette, 1987).

## 4. Evaluation of the adequacy and efficacy of the law governing protection of the elderly from abuse

For our evaluation of the adequacy of the law, described in the previous section, in protecting the elderly from the various forms of abuse—with the exception of financial exploitation, which will be discussed in the next part—it is appropriate to specify the criteria used.

### *4.1 Criteria for evaluating each of the 5 forms of elder abuse*

Based on the elements mentioned in the description of the various forms of abuse, as well as on the situations covered by the various elements of the law, it is possible to set the following criteria for each of the forms of abuse most commonly directed against the elderly.

1. Physical abuse
    a) Assault
    b) Sexual assault
    c) Forcible confinement
    d) Protection of persons presenting a danger to their own life or the lives of others

2. Chronic psychological abuse
    a) Threats of assault
    b) Harassment
    c) Intimidation
    d) Mental cruelty or the deliberate infliction of mental suffering

3. Neglect
    a) Neglect of one's duty of care
    b) Neglect of one's fiduciary duty
    c) Protection of older persons incapable of looking after themselves
    d) Intervention in emergencies
    c) Neglect of the duty to provide the necessaries of life

4. Loss of rights
    a) Mental incapacity to manage one's life
    b) Mentally incapable persons who refuse treatment
    c) Physically incapable persons who refuse treatment
    d) Persons with all their mental faculties who refuse treatment
    e) Invasion of intimacy and privacy
    f) Protection of human rights

These various problems have already been dealt with in the previous sections. It is important, however, to have an overview in order to assess the relevance of the various laws that pertain to them.

### *4.2 Evaluation of the adequacy and efficacy of the various elements of Canadian law governing physical and sexual assault and chronic psychological abuse*

#### *4.2.1 The adequacy of the law*

Table 1 provides an overview of the various types of physical, sexual and chronic psychological abuse that may or may not be covered by the various elements of Canadian law. From a quick glance at the table, it can be seen that most of these types of abuse are adequately

covered both by the provisions of the Canadian *Criminal Code* and by common law and the *Civil Code of Québec*. However, the legislative provisions governing guardianship and trusteeship and the laws governing protection of the mentally ill do not cover such abuse. Finally, the laws adopted in the Atlantic provinces to combat elder abuse also address these different types of abuse.

The description of the provisions of the Canadian *Criminal Code* and the provisions of common law and of the *Civil Code of Québec* leave no doubt that physical and sexual abuse are adequately covered. It must be acknowledged, however, that prior to 1980, the provisions of the *Criminal Code* did not properly cover the question of sexual assault, the law confining itself at the time to rape. However, amendments to the *Criminal Code* in 1982 now stipulate that any assault having a sexual connotation constitutes a criminal offence.

The problem of chronic psychological abuse was certainly not well covered by the *Criminal Code* until the 1993 amendments with respect to stalking. However, since the mid-1990s, it can be said fairly reliably that physical and sexual assault and chronic psychological abuse have been adequately covered by the Canadian *Criminal Code*.

The elder protection laws were designed to address a problem, which was that the laws governing guardianship and the laws protecting the mentally ill did not cover physical and sexual assault or chronic psychological abuse. These laws were, and still are, the domain of social workers and health professionals, who acted as though the provisions of the *Criminal Code* did not exist and insisted that the laws, which they were responsible for implementing adequately and effectively, covered the physical, sexual and psychological abuse to which the elderly were exposed.

**Table 1**

**Evaluation of the adequacy and efficacy of Canadian law in protecting the elderly from physical and psychological abuse**

| Types of abuse | Cr. Code | | Common law | | Guardianship & trusteeship | | Mental health | | Protection of the elderly | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Eff | Adeq. | Eff. | Adeq. | Eff. |
| 1. Physical abuse | | | | | | | | | | |
| a) Assault | X | B | X | D | | | | | X | C |
| b) Sexual assault | X | B | X | D | | | | | X | C |
| c) Forcible confinement | X | D | X | D | | | | | X | C |
| d) Protection of persons who endanger their own life or that of another | | | | | | | X | B | | |
| 2. Chronic psychological abuse | | | | | | | | | | |
| a) Threats of assault | X | C | X | D | | | | | X | D |
| b) Harassment | X | C | X | D | | | | | | |
| c) Intimidation | X | C | | | | | | | | |
| d) Mental cruelty | | | X | D | | | | | X | D |

Legend: Adeq. = Adequate: is adequately covered by the area of law concerned
Eff. = Effective: achieves the desired objective
X =Is adequately covered by the area of law concerned
A = very effective; B = fairly effective; C = somewhat effective; D = not very effective; ? = cannot be evaluated

### *4.2.2 The efficacy of the law*

Were the social workers and health professionals right—and above all, are they still right—to call for the adoption of special legislation to protect the elderly from abuse? About the efficacy of the *Criminal Code* provisions governing physical abuse, Bunge and Levelt (1998) report that in 1996, "elderly adults accounted for 2% of the victims of violent crimes reported to police" (p. 25) [translation]. However, these authors write that in 20% of all crimes of violence committed against persons age 65 or older, family members were the cause, and in 80% of cases, persons other than family members were at fault. These authors add that, like cases of spousal assault, "it is suspected that a small portion of these cases of violence against older adults are brought to the attention of the legal system" (p. 25) [translation]. If the data from the national survey by Podnieks and Pillemer (1990) are compared with the data from police statistics analysed by Bunge and Levelt (1998), it must be concluded that the provisions of the *Criminal Code* are fairly effective in ensuring the protection of the elderly. However, many problems prevent these provisions from being more effective. These factors will be analysed in Part III of this report.

As can be seen from Table 1, the common law provisions and those of the *Civil Code of Québec* are not very effective in protecting the elderly from physical and sexual assault or psychological abuse. The civil remedies can in fact only be used after the abuse occurs, and often require long and costly legal proceedings. Moreover, the abuser does not always have the financial means to make it possible, if the lawsuit is successful, to enforce the judgment.

As the provisions governing guardianship and trusteeship are not designed to protect the elderly from physical, sexual or psychological abuse, they are therefore neither adequate nor effective in doing so. It is precisely to make up for this ineffectivenss that the laws to protect the mentally ill have been adopted. As Table 1 shows, these laws cover specifically the protection of persons with mental disorders who present a danger to themselves or others. The mental health laws are fairly effective, notably in protecting persons who are mentally ill and present a danger to themselves or others.

What about the efficacy of the laws adopted by the Atlantic provinces to protect abused adults? The only data available are those provided by Nova Scotia, as New Brunswick has not published since 1988 any data on the implementation of the provisions of the *Family Services Act* (1980, ss. 34-42) that protect the elderly. The comparative data for Nova Scotia and some data obtained from contacts in other provinces were analysed by Coughlan et al. (1995). In addition, Poirier (1993, 1997) analysed all relevant court records of New Brunswick and data obtained from contacts made through a survey of social workers working in the province in the field of elder protection.

These analyses reveal three things. Firstly, Table 2 very clearly shows that in Nova Scotia physical and sexual assault account for just under 10% of all cases referred to social workers. Counting all cases of abuse referred to social workers over a year, they account for just under 25% of the total. Coughlan et al. (1995, p. 52) write that by the time mistreatment cases make it

to court, there are virtually no cases of abuse, and the court hears almost exclusively cases of self-neglect. These authors conclude from this that "our belief, therefore, is that the actual use of the *Adult Protection Act* in Nova Scotia suggests that it is not an appropriate primary response to the various problems that need to be addressed" (p. 53).

Similarly, Poirier (1993, 1997) points out that the New Brunswick court records he analysed showed no cases of mistreatment and only one case of sexual exploitation. This latter case concerned incest involving a mentally disabled young woman. Now, in this case, the *Criminal Code* had been invoked, as had the *Family Services Act*. Charges were in fact brought against the father. As the young woman had been placed in her sister's care, it is highly likely that the same outcome might have been achieved informally without resorting to the *Criminal Code*. The analysis by Poirier (1993, 1997) of official statistics, court records and cases gathered by students in the francophone areas of New Brunswick clearly shows that the provisions of the *Family Services Act* governing elder protection are inadequate when it comes to physical abuse. Moreover, the social workers themselves were of the opinion that these provisions were not very effective.

**Table 2**

**Categorization of cases referred to Nova Scotia's social services from 1986 to 1995**

| Categories | 1986 | 1987 | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 |
|---|---|---|---|---|---|---|---|---|---|---|
| Number of cases | 74 | 376 | 637 | 606 | 767 | 2 099 | 1905 | 2261 | 2884 | 2955 |
| Elderly persons | n/a | n/a | 81% | 53% | n/a | 68% | 72% | 71% | 73% | 69% |
| Disabled adults | n/a | n/a | 19% | 47% | n/a | 32% | 28% | 29% | 27% | 31% |
| Self-neglect | 80% | n/a | 76% | 66% | 63% | 64% | 66% | 64% | 66% | 62% |
| Neglect by natural caregivers | n/a | n/a | n/a | n/a | 19% | 14% | 13% | 11% | 12% | 15% |
| Abuse | n/a | n/a | 24% | 46% | n/a | n/a | n/a | n/a | n/a | n/a |
| physical | n/a | n/a | n/a | n/a | 5% | 7% | 8% | 8% | 7% | 7% |
| sexual | n/a | n/a | n/a | n/a | 1% | 1% | 1% | 1% | 1% | 2% |
| psychological | n/a | n/a | n/a | n/a | 8% | 6% | 7% | 7% | 5% | 5% |
| other | n/a | n/a | n/a | n/a | 4% | 8% | 8% | 9% | 9% | 9% |

Legend: n/a = not available

### *4.3 Evaluation of the adequacy and efficacy of the various elements of Canadian law governing protection of the elderly from neglect*

#### *4.3.1 The adequacy of the law*

Table 3 provides an overview of the situations of neglect covered by the various areas of Canadian law. At first glance, the various traditional elements of Canadian law do not cover the different situations of elder neglect, which may have motivated the proponents of new solutions to promote the adoption of laws designed to protect the elderly from neglect.

On closer examination, however, under section 215 of the *Criminal Code*, a person must provide necessaries of life to a person under his charge if that person in unable, by reason of age, illness, insanity or other cause, to withdraw himself from that charge and to provide himself with necessaries of life. Moreover, common law and the *Civil Code of Québec* also stipulate that persons in a position of weakness and dependent on another may file a civil suit if the person on whom they depend has breached their duty of care or their fiduciary duty towards them.

The laws governing the protection of the mentally ill authorize the authorities to institutionalize someone against their will if the person, by their behaviour, including their refusal to provide for their own care and needs, risks endangering their life or health (Poirier, 1991, pp. 575-578).

The laws of the western provinces governing guardianship and trusteeship and Quebec's legal provisions in these same areas have also been amended to allow greater flexibility for intervention in the case of temporarily or partially incapacitated persons. It is important to state, however, that these laws do not permit intervention against the will of someone still mentally capable of making reasonable decisions regarding their well-being.

The proponents of laws to protect abused adults found that the laws in effect in the late 1970s did not permit social workers to intervene in the case of a mental incompetent when there was self-neglect, neglect or the risk of neglect, which is why they proposed the adoption of special legislation authorizing protective intervention even in the case of someone refusing their services. These laws, of course, cover intervention in the case of persons who are neglected, and especially in cases of self-neglect. But many have questioned the validity of provisions that allow for intervention in the case of a mental incompetent against that person's will (Coughlan et al., 1995, pp. 86-110; Gordon andVerdun-Jones, 1992, pp. 2-42; Poirier, 1991).

**Table 3**

**Evaluation of the adequacy and efficacy of Canadian law in protecting the elderly from neglect**

| Neglect and Self-neglect | Cr. Code | | Common law | | Guardianship & trusteeship | | Mental health | | Protection of the elderly | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Effc. |
| 1) Neglect of one's duty of care | | | X | D | | | | | | |
| 2) Breach of one's fiduciary duty | | | X | D | | | | | | |
| 3) Protection of elderly unable to care for themselves | | | | | | | X | B | X | B |
| 4) Intervention in urgent cases | | | | | | | | | X | A |
| 5) Breach of duty to provide necessaries of life | X | D | | | | | | | X | B |
| 6) Self-neglect | | | | | | | X | ? | X | A |

Legend: Adeq. = Adequate: is adequately covered by the area of law concerned
Eff. = Effective: attains the desired objective
X = Is adequately covered by the area of law concerned
A = very effective; B = fairly effective; C = somewhat effective; D = not very effective; ? = cannot be evaluated

Some Nova Scotia decisions have even declared these provisions inoperative because they contravene sections 7, 9 and 10 of the *Canadian Charter of Rights and Freedoms* (*Nova Scotia* v. *Burke*, 1989; *Nova Scotia* v. *Perry*, 1990).

### *4.3.2 The efficacy of the law*

Analysis of the legal decisions relating to the protection of persons clearly shows that it is in the area of neglect and self-neglect that social intervention is increasing in the Atlantic provinces. The data for Nova Scotia reproduced in Table 2 speak volumes in this regard. The studies of Coughlan et al. (1995) and Poirier (1993, 1997) confirm these results.

As for the efficacy of the various elements of Canadian law in combatting elder neglect, Table 3 shows that the traditional elements of Canadian law are not very effective in countering this problem. Only section 215 of the *Criminal Code* is pertinent. Moreover, this section is rarely used generally, and is used even less often in cases involving abused adults.

Similarly, the provisions of Canadian common law and the *Civil Code of Québec* concerning neglect and fiduciary duty are seldom applied. In fact, only in the last few years has it begun to be noticed that there is no protection between relatives from acts of negligence causing bodily or other injury. And the theory of fiduciary duty towards a dependant—usually a child, though it applies to other persons as well—was not recognized by the Supreme Court of Canada until the early 1990s (*K.M.* v. *H.M.*, 1992). Needless to say these actions for tort are seldom brought before the courts, except in cases of sexual assault of a child by a parent (DesRosiers and Langevin, 1998).

Nor are the laws governing guardianship and trusteeship very effective. It was to correct this situation that the laws to protect the mentally ill were adopted over a century ago. It is generally acknowledged that, when the life or health of a mentally ill person or someone else is threatened because of their condition, the laws to protect the mentally ill may be invoked. A physician's opinion must be obtained in order to have the person institutionalized for a psychiatric examination, or to file a complaint before a judge, who may then order that the person undergo a psychiatric examination. This legislation is especially effective, both because it is easy to implement and because of the protection it affords the individual. The decisions in the different provinces interpreting mental health legislation recognize that a person's refusal to do what is necessary to ensure their health may constitute just cause for forcing them to receive care, if the refusal is attributable to a mental disorder (*Casford, re*, 1983; *Fleming* v. *Reid*, 1991; *Kletke* v. *U. (D.)*, 1990; *Lévesque* c. *Ouellet*, 1990; *Nova Scotia* v. *J.G.*, 1986). As the definition of this term is very broad, it does not seem necessary to adopt specific laws that take up these same elements (Poirier, 1991, pp. 575-578). However, if the person has no mental disorder, the intervention cannot be upheld by these laws.

As can be seen from Table 3, the laws aimed specifically at protecting the elderly or disabled seem theoretically to be more effective than those to protect the mentally ill. However, analysis of New Brunswick court records and of cases gathered in the field by Poirier (1993,

1997) show that in practice, the *Mental Health Act* is faster and more effective than the provisions of the *Family Services Act*. What is more, the analysis by Poirier (1995) of these records shows that in half the cases, the *Family Services Act* was invoked because the elderly or disabled person constituted a danger to himself or others. It is fairly evident that the *Mental Health Act* could just as well have been invoked, and that it certainly was not necessary to adopt special legislation to protect the elderly.

Where the provisions of the *Family Services Act* are more effective than those of the *Mental Health Act* is in cases where the person who cannot or will not act to ensure their care is an elderly or disabled persons in possession of all their mental faculties. In these cases, the other laws cannot authorize intervention, whereas the *Family Services Act* can. The question the legislator should ask himself is whether it is necessary to intervene at any cost in cases of mentally competent persons who refuses to live according to the criteria of social workers. This is a provision likely to be declared inoperative in view of the *Canadian Charter of Rights and Freedoms* (Coughlan et al., 1995, pp. 109-110; Gordon and Verdun-Jones, 1992, pp. 2-42; Poirier, 1991).

The data in Table 2 show that more than three quarters of cases brought to the attention of Nova Scotia's social services are cases of neglect and self-neglect. Coughlan and his collaborators (1995, p. 52) conclude that the only cases that end up in court are cases of self-neglect. According to these researchers, they involve elderly persons who ask for services but refuse the limited range of services offered by social workers. The problem is made worse by the fact that the Nova Scotia statute does not give the judge the power to order that the services needed be provided; he only has the power to issue an order authorizing the Minister to provide services to the adult in question (p. 55).

### *4.4 Evaluation of the adequacy and efficacy of the various elements of Canadian law governing protection of the rights of the elderly*

#### *4.4.1 The adequacy of the law*

Table 4 provides an overview of the elements of Canadian law apt to protect the rights of the elderly. This section will not provide a detailed look, but only an overview of the situation.

The protection of the rights of the elderly is not a particular concern of the *Criminal Code*. Of course, the provisions of the *Criminal Code* apply as much to the elderly as to other citizens, such that sections 183-196 respecting the interception of private conversations protect privacy. Similarly, the legal rights contained in the *Canadian Charter of Rights and Freedom* also apply to the elderly. Some provisions of the *Charter*, notably sections 7, 9 and 10, have been invoked to prevent the elderly from being institutionalized against their will, particularly when they were mentally competent to make decisions (Coughlan et al., 1995, pp. 86-110; Poirier, 1991; Gordon andVerdun-Jones, 1992, 2-42).

The provisions of Canadian common law respecting tort liabilities and of the *Civil Code of Québec* respecting extracontractual liabilities do not cover situations of persons mentally

incompetent to make decisions for themselves or to refuse treatment. However, both Quebec and common law decisions are very clear to the effect that patients in possession of their mental faculties may refuse all treatment, even if this refusal may result in their death. The decisions on the refusal of Jehovah's Witnesses to receive blood transfusions speak volumes in this regard (*Malette* v. *Shulman*, 1990). In Quebec, the decision in the *Nancy B.* (1992) case put an end to the dithering on the subject. Also, the decision of the Supreme Court of Canada, in *Aubry* v. *Éditions Vice-versa*, 1998, maintained that the right to intimacy and privacy was protected by the provisions of the Quebec *Charter of Human Rights and Freedoms*. Canada's western provinces have adopted laws designed to provide limited protection of intimacy and privacy.

The laws governing trusteeship are generally intended to provide a legal solution to the problem presented by persons who are permanently mentally incompetent to manage their life. In most provinces, except Prince Edward Island and New Brunswick, laws governing guardianship and others have been adopted authorizing the patient to designate someone else to make decisions for them and according to their instructions.

The *Mental Health Act* is not designed to solve these problems of a general nature. It must be recognized, however, that in the absence of a private trustee, the Act stipulates that when a person admitted to a psychiatric institution is declared incompetent to make their own decisions, a court may order certain treatment to be administered against the person's will (Poirier, 1997, pp. 61-65; Robertson, 1994).

The laws of the Atlantic provinces governing the protection of neglected adults, including the elderly, of course allow intervention when someone cannot manage their life and has diminished mental faculties. Intervention is also allowed when persons living in the community refuse treatment—neglect themselves—even if they are not mentally competent to make reasonable decisions. In this regard, these laws constitute significant interference in the privacy of the elderly (Coughlan et al., 1995, pp. 90-100; Gordon and Verdun-Jones, 1992; Poirier, 1997, pp. 204-209).

**Table 4**

**Evaluation of the adequacy and efficacy of Canadian law in protecting the elderly from loss of their rights**

| Protection of incompetent persons and the rights of the elderly | Cr. Code | | Common law | | Guardianship & trusteeship | | Mental health | | Protection of rights of elderly | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Eff. |
| 1) Mental incapacity to manage one's life | | | | | X | C | X | A | X | B |
| 2) Mental incompentents refusing treatment | | | | | X | C | X | A | X | B |
| 3) Physical incompetents refusing treatment | | | X | C | | | | | X | D |
| 4) Persons in possession of their mental faculties who refuse treatment | | | X | C | | | | | X | D |
| 5) Invasion of intimacy and privacy | X | D | X (Q) | C | | | | | X | D |

Legend: Adeq. = Adequate: is adequately covered by the area of law concerned
Eff. = Effective: achieves the desired objective
X = Is adequately covered by the area of law concerned
A = very effective; B = fairly effective; C = somewhat effective; D = not very effective; ? = cannot be evaluated

### *4.4.2 The efficacy of the law*

Very few studies have been devoted to the protection of the elderly from loss of their rights. Our evaluation of the elements of Canadian law is based even more so on educated guesses in this particular area than in the other areas of the law.

Table 4 provides an overview of the sectors covered by the different areas of Canadian law with regard to the protection of older persons from loss of their rights. While the *Criminal Code* adequately protects citizens' privacy against the interception of communications, needless to say the elderly are not the ones most likely to be targeted by sections 183-196 of the *Criminal Code*. Thus, the provisions of the *Criminal Code* are not very effective in protecting the intimacy and privacy of the elderly.

The provisions of common law and Quebec civil law are especially relevant when it comes to protecting patients who have their mental faculties and refuse all treatment. However, even when the law is very clear in this regard, it seems rather ineffective in compelling medical staff to respect the rights of patients, notably elderly patients in the terminal phase of illness who refuse all treatment. American studies show that even when the laws were clear in this regard, the rights of terminally ill patients were not respected in nearly 50% of cases (Teno et al., 1997a, 1997b). Similar results were obtained by Canadian researchers (Wilson, 1997). Norma Poirier (in press) showed that in New Brunswick in particular, the administrative policies adopted by over half the hospital corporations were at variance with the law in force in the province governing the right of terminally ill patients to refuse treatment.

The provisions governing guardianship and trusteeship and the laws authorizing a person to designate someone to make decisions for them in the event of their incapacity, should, in theory, ensure that the patient's will regarding medical treatment is respected. Yet, if the right to refuse treatment is not respected even when the law is very clear in this regard, it risks being even less so when it is the designated individual, and not the patient himself, who refuses the treatment on the patient's behalf. The few studies on the subject show that in nearly 50% of cases, the expression of the refusal of treatment by a designated individual is ignored by medical staff (Poirier, in press).

Obviously, mental health laws cover only mentally ill persons who present a danger to themselves and others. While these laws may be very effective for intervening in the case of this clientèle, they cannot be implemented in the vast majority of cases. Moreover, when they are, they are very respectful of the rights of individuals, as they must comply with the *Canadian Charter of Rights and Freedoms*. Specific court procedures must be followed before the mentally ill person loses their rights to refuse certain treatment (Gordon and Verdun-Jones, 1992; Poirier, 1997, pp. 61-65; Robertson, 1994).

As for the laws adopted in the Atlantic provinces to protect neglected adults, including the elderly, they are fairly effective in protecting the rights of the elderly where mentally incapacitated persons are concerned. However, according to the New Brunswick court records analysed by Poirier (1995), judges choose to rely on the *Infirm Persons Act* (1973) rather than

the provisions of the *Family Services Act* designed to protect the the elderly, because they prefer a private trusteeship to the guardianship of the Department of Health and Community Services. One of the records studied by Poirier (1995) concerned the case of a father who refused to have his son, who had been left a quadriplegic as the result of a automobile accident, cared for. Under the *Family Services Act*, the Minister of Health and Community Services must appear in court every six months until the person's death, even if there is no improvement in the person's health condition. In contrast, reliance on the *Infirm Persons Act* does not require such a procedure. However, the provisions in the Atlantic provinces governing protection of the elderly do not sufficiently take into account the rights of the persons it is designed to protect. The question that will ultimately be asked is whether, in order to protect a few individuals, it is necessary to interfere with their rights and those of a very large number of other elderly persons (Coughlan et al., 1995, pp. 86-110; Gordon and Verdun-Jones, 1992, pp. 2-42; Poirier, 1995).

## 5. Conclusion

This part was devoted to a description of the different elements of Canada and Quebec law in force apt to combat the various forms of elder abuse. Five main elements of Canadian and Quebec law are relevant in this regard. They are: the various provisions of the Canadian *Criminal Code*, the provisions of common law and of the *Civil Code of Québec*, the provisions respecting guardianship and trusteeship, the laws to protect the mentally ill, and the laws adopted in the Atlantic provinces to protect neglected and abused adults.

The evaluation of the adequacy of the different elements of Canadian and Quebec law lead one to believe that, as a rule, the provisions of current law are adequate for combatting the various forms of elder abuse, without the need to adopt special legislation aimed at neglected adults such as exist in the Atlantic provinces.

It goes without saying, however, that the laws of some provinces could be improved. Legislative amendments should be made to protect the rights of the elderly—and of the population as a whole—when it comes to recognizing powers of attorney in anticipation of incapacity, in order to ensure that the patient's wishes will be respected by medical staff, notably, in New Brunswick and Prince Edward Island. Moreover, better protection of the rights of the elder residents of long-term care facilities could follow the lines of the Ontario legislation setting out the rights of nursing home residents (*Nursing Homes Act*, 1990, s. 2). Protection of the rights to intimacy and privacy of the elderly—and of the population as a whole—could be ensured by provisions similar to those of Quebec, or at least similar to those adopted by Canada's western provinces.

While most authors acknowledge the adequacy of the law in protecting the elderly against the various forms of abuse, they generally admit that the existing law is not very effective in countering abuse. The main problem is one of implementation of the existing statutory and legal provisions.

Thus, in criminal law, the provisions of the Canadian *Criminal Code* adequately cover most forms of abuse, with the exception of neglect. The problem is one of application. First of

all, with regard to elder abuse, our society is not yet beyond the stage it was at in 1980 with respect to violence against women. As physical abuse of the elderly is in fact spousal abuse, the means used should be the same as those that have been in effect since the mid-1990s to combat domestic abuse. Steps similar to those taken to combat spousal abuse should be taken to combat the various forms of elder abuse.

## PART III: THE CONSTRUCTION OF A CONCEPTUAL FRAMEWORK TO EXPLAIN WHY IT IS DIFFICULT TO COMBAT FINANCIAL EXPLOITATION OF THE ELDERLY

### 1. Introduction

The first two parts dealt with the issue of the prevalence of elder abuse generally and evaluated the adequacy and efficacy of the different elements of Canadian law in combatting the various forms of abuse. This third part will focus on the financial exploitation of the elderly and attempt to answer the following question: "Why is it so difficult to combat financial exploitation of the elderly?" To this end, the authors will present a conceptual framework adapted to the situation.

A special chapter has been set aside to analyse financial exploitation for the following reasons. First of all, financial exploitation is the most common form of abuse faced by the elderly; most studies show that financial abuse accounts for about 50% of all elder abuse. Secondly, the data reported in the first two parts tend to show that the law is considerably less effective with respect to financial exploitation than other types of abuse, notably, physical and psychological abuse.

This part will comprise five sections. The first will present the three main reasons cited to explain why it is difficult to combat financial exploitation of the elderly. The second will briefly present the methods in making this evaluation. The third section will analyse the data on the adequacy and efficacy of elements of Canadian law, focussing on financial abuse of the elderly. Once these elements have been brought together, the fourth section will be devoted to building a conceptual model to explain why it is so difficult to combat financial exploitation of the elderly. Finally, a fifth section will make recommendations to help authorities effectively combat the financial exploitation of the elderly by their descendants.

### 2. Reasons for the ineffectiveness of the law in protecting the elderly

Several reasons have been given to explain the ineffectiveness of the law in protecting the elderly from the financial exploitation to which they fall victim. The main reasons revolve around three axes: reasons related to the inadequacy of the law; institutional reasons; and reasons related to the family values of the elderly. Each of these categories requires further explanation.

#### *2.1 Reasons related to the inadequacy and ineffectiveness of traditional law*

The first set of reasons encountered in the literature on elder abuse centres on the inadequacy of the law in this regard. That is why the pioneers of elder protection, for the most part social workers, felt they had no adequate legislation for fulfilling their protective mission. They therefore promoted legislation having two objectives: firstly, to make it mandatory for professionals and the general population to report their suspicions of elder abuse; secondly, to adopt legislation allowing social workers to intervene as easily is they do in cases of child abuse.

Like the child protection laws, these laws create a burden of proof based on the balance of probabilities rather than the criminal law obligation to prove beyond a reasonable doubt, and provide considerable ease of intervention because of the significant powers they grant social workers and judges.

### *2.1.1 Mandatory reporting*

Traditional law does not oblige citizens to report crimes witnessed by them. It has even been necessary to rely on reward programs (Crime Stoppers) to get citizens who have witnessed crimes to contact the police and report evidentiary elements they believe they have. The ineffectiveness of criminal law is largely attributable to the fact that many crimes remain unknown to the police and prosecutors. This is the case, notably, with crimes committed within the family.

To counter this aspect of the inadequacy and ineffectiveness of criminal law, most jurisdictions in North America have adopted legislative provisions making it easier to report suspicions that an elderly person is being neglected or abused, as was done to prevent child abuse. In fact, all 50 American states have adopted laws governing the elderly, and all except New York have included financial exploitation among the acts of elder abuse (Wilber andReynolds, 1996). In addition, most American states either make it mandatory to report acts of abuse, or encourage the public, and especially professionals, to report their suspicions by stipulating that anyone who, in good faith, reports a case of elder abuse may not be prosecuted for having acted lawfully. In Canada, the relevant legislation of Newfoundland, Nova Scotia, Manitoba and Ontario makes it mandatory for citizens, especially providers of services, to report their suspicions of elder abuse. In contrast, the laws of New Brunwick, Prince Edward Island and British Columbia encourage their citizens, notably professionals, to report their suspicions (Robertson, 1995, p. 87).

### *2.1.2 Considerable powers granted to social workers*

Another criticism social workers have of criminal law and traditional civil law is that too many limits are placed on protective intervention. To counter this problem, social workers have argued in favour of legislation having two objectives: to grant social workers rather than police officers the power to intervene, and to grant social workers broader powers than those granted to police under the *Criminal Code*. If we take the provisions of New Brunswick's *Family Services Act* (1980, ss. 34-42) governing protection of the elderly as an example of the powers granted to social workers, and compare them to the powers the *Criminal Code* grants to police officers, we note the major differences shown in Table 5.

As Table 5 shows, the *Family Services Act* (1980, subsection 35(3)) stipulates that in the course of investigating suspected elder neglect or mistreatment, social workers have broader powers than the police. Thus, a social worker does not need a warrant to enter a home and conduct an investigation, unless there is opposition, in which case a judge may issue a warrant. While the warrant to enter a person's home constitutes an extraordinary procedure for the social worker, it is normal procedure for the police (*Southam Inc.* v. *Hunter*, 1984).

Pursuant to the *Family Services Act* (1980) of New Brunswick, a social worker "may request and authorize a medical practitioner to examine and report on the physical and mental condition of the person and the care and attention he is receiving" (subsection 35(1)). This Ministerial consent gives the physician sufficient power to discharge this responsibility "without the consent of the person being examined" (subsection 35(2)). In civil law, however, it has been recognized for centuries in Anglo-Canadian law (*Cole* v. *Turner*, 1704; Linden, 1997, pp. 45-48) and in Quebec civil law (*Civil Code*, s. 19; Mayrand, 1975, p. 12; Baudouin and Deslauriers, 1998, pp. 283-284) that anyone touching another person without that person's consent is committing a civil wrong for which the person may be compensated, even if there is no injury.

The other solutions available to social workers for getting around legal procedures distinguish the social model from the judicial model that characterizes the work of police officers. Although the judicial model that characterizes the *Criminal Code* relies heavily on plea bargaining, the sentence is always pronounced by the judge and the trial takes place openly in court. This is not the case with the social model, since the Court does not supervise the vast majority of cases, notably in New Brunswick (Poirier, 1988).

The problem with the solutions proposed by social workers in the four Atlantic provinces is that these laws do not at all apply to financial exploitation, the main form of elder abuse. It is therefore not mandatory to report the suspected financial exploitation of an elderly person.

**Table 5**

**Comparative table of the powers granted to police under the *Criminal Code* and those granted to social workers under New Brunswick's *Family Services Act***

| Intervention | Social worker | Police |
|---|---|---|
| 1. Investigations | When there is reason to believe that an elderly person is neglected, must conduct an investigation (35(1)). | May conduct an investigation. |
| 2. Job impediment | Offence (35(3)). | Offence (Cr.C. s. 113). |
| 3. Responsibility | Exonerated (3(3)). | Exoneration (Cr.C. s. 25). |
| 4. Voluntary agreements | Encouraged. Without Court supervision (37(1)) | Agreements, but with Court supervision through sentencing. |
| 5. Warrants | Not needed to enter the home and examine the person (35(1)) | Usually needed: *Hunter* v. *Southam Inc.* [1984] 2 S.C.R. 145. |
| 6. Cease and desist orders | The judge may issue one (39(1)(*c*)). | Left to the judges. |
| 7. Procedure | Usually avoids going to court | Rigorously described in Part III of Cr.C. |

### 2.2 *Institutional reasons*

A second set of reasons for the ineffectiveness of Canadian law in combatting abuse generally, and financial abuse specifically, of the elderly is cited mainly by feminists and criminologists. In comparing it with the ineffectiveness of the criminal justice system in countering violence against women, these groups cite the progress made in combatting the abuse of women since the establishment of institutional measures to this end. In their view, the same remedies apply to the elderly as well, since they face problems similar to those of abused women.

#### 2.2.1 *Systemic discrimination: ageism*

Many authors feel that one major reason for the apathy about financial exploitation of the elderly is the systemic discrimination they face (Faulkner, 1982; Gordon, 1986; Hortsman, 1975; Krauskoff and Burnet, 1983; Regan, 1981). This systemic discrimination is evidenced, firstly, in the laws designed specifically to protect the elderly. These laws are criticized mainly because they treat older persons like children. This is especially evident in New Brunswick, where the provisions governing protection of the elderly are included in those aimed at child protection (*Family Services Act*, 1980, s. 34-42). Moreover, like the child protection provisions, the elder protection laws of the Atlantic provinces, notably Nova Scotia and Newfoundland, make it mandatory for professionals to report any suspicions of someone being neglected or abused.

These laws are also criticized for their overly vague terminology. Thus, they apply not only to persons who, owing to physical or mental disabilities, are unable to care for themselves and do not receive proper care, but also to persons who, because of their age, do not receive appropriate care. Thus, according to the *Family Services Act* (1980), an abused adult is an elderly person who "is a victim of or is in danger of becoming a victim of physical abuse, sexual abuse, mental cruelty, or any combination thereof" (paragraphs 34(2)(*a*)-(*d*)). These provisions are so broad in scope that virtually anyone age 65 or older may be considered to be "in danger of becoming a victim of physical abuse, sexual assault, mental cruelty, or any combination thereof." They are not aimed only at persons who have been victims, but want to prevent any risk of victimization. Preventive intervention is not only encouraged, but specifically stipulated and sanctioned by the Act.

#### 2.2.2 *Police*

Bond and Penner (1995) conclude that in Canada in particular, the ineffectiveness of the criminal law is owing to the lack of police involvement in cases of financial exploitation. In their view, this lack of interest on the part of police is owing to their limited success when these cases reach court. In contrast, Robertson (1995) writes that "one of the principal reasons for this is the abused person's unwillingness or inability to complain to the police or to testify in court ... . In addition, there may be a reluctance on the part of the authorities (such as police and Crown

prosecutions) to prosecute, and difficulty in obtaining the necessary evidence to establish guilt beyond reasonable doubt" (p. 56).

### *2.2.3 Lack of resources*

The elderly cite many reasons for not pursuing their claim; a good many hinge on the lack of resources. Langan and Means (1996) state that other reasons why victims of financial exploitation do not take action are: (1) relatives and professionals are not aware of the available options, with the result that they sometimes take actions that some may see as financial exploitation; (2) the evaluation and collection of money from this group of persons poses real problems for social service agencies. Eisenberg (1991) estimates that the reasons why the elderly do not sue their children when they have been financially exploited include: (3) the considerable costs involved, notably, lawyers fees, especially when there is no civil legal aid (p. 82), and lawyers do not want to sue because old people have no money and the case may well not be very profitable given the amount of work involved (p. 83-84); and finally, (4) the relevant law is complex, and few lawyers have a thorough knowledge of the law governing financial exploitation.

## *2.3 Reasons related to family values*

For police and civil authorities to be able to apply the relevant elements of Canadian law to elderly persons who have been financially exploited, they must be aware of the offences under the *Criminal Code* and civil law. One of the main reasons for the lack of action on the part of authorities is that the elderly systematically refuse to report their abuse, notably, financial abuse (Robertson, 1995, p. 84). Why is this so?

### *2.3.1 To avoid hurting their children*

In a study of a random sample of 200 elderly persons in British Columbia, Spencer (1996) reports that seniors consider it their duty to help their children in need by lending them or their grandchildren money at no interest; if the money is not paid back, they bear the loss without saying a word. In fact, less than 5% would be prepared to take legal measures in the event of non-payment.

Eisenberg (1991) estimates that the reason why the elderly do not sue their children when they have been financially abused is that they feel it is improper to sue one's relatives. In other words, suing family members is perceived as going against common sense and family values.

### *2.3.2 Shame and guilt*

Like abuse women, elderly people who have been abused and financially exploited tend to feel guilt and shame about what has happened to them, particularly if the abuser is a relative. These feelings of embarrassment, shame and guilt have been very well documented by those who study domestic violence and are also seen in cases of financial exploitation of the elderly.

### *2.3.3 Quality of life*

Maintaining a good quality of life is an important reason the elderly cite for not taking legal action against their descendants who may have exploited them. According to Spencer (1996), 32% of the respondents of her study of a random sample of 200 seniors in British Columbia said they had less energy and time to spend on lawsuits or other proceedings and that it would diminish their quality of life (p. 14). Their quality of life might actually be diminished by the fact that they fear the legal system, which is very complex, and by the anxiety they could experience as a result of having to testify in court.

Also, the expenses of civil suits, notably lawyers' fees, are high, particularly if there is no civil legal aid (Eisenberg, 1991, p. 82). The payment of large sums even before proceedings begin may further erode the funds of these seniors, who have already been stripped of a portion of their assets. The payment of lawyers' fees could further lower their standard of living and quality of life.

Zuzga (1996), a prosecutor for Los Angeles County, writes that one of the reasons for the limited effectiveness of criminal law is the difficulty in getting older persons to testify, as they often feel excluded from the judicial system and are often anxious about testifying and undergoing cross-examination. Ashton (1995) draws similar conclusions. It is not difficult to understand why the elderly prefer to live their remaining days in peace rather than go through the anxiety of a possible court appearance.

### *2.3.4 Leaving something to the children*

Another reason mentioned by authors (Langan and Means, 1996; Poirier, 1992) is the desire to pass on money and property to the next generation, rather than leave one's estate to the government in the form of nursing home fees. This desire to leave an inheritance to their children is also cited by Spencer (1996) when she concludes her study by stating that descendants who financially exploit their parents or grandparents feel, among other things, that they are entitled to the property they take, either because they are the only future heirs, or because they feel they have earned it.

## 3. Methodology

The main task in this part of the study is to evaluate which of the three reasons cited best explains why it is so difficult to combat financial exploitation of the eldery. The method used is the same as that described in Part II of this report for assessing the adequacy and efficacy of the elements of Canadian law that protect the elderly from the various forms of abuse. In this part, however, only the financial exploitation of the elderly will be considered.

The planned evaluation will therefore consist of four stages. The first stage will be to determine the status of the various elements of Canadian law (*Criminal Code*, common law and Quebec civil law, provincial laws regarding incapacity, and special legislation enacted to protect the elderly) relating to the protection of the elderly from financial exploitation. The second stage

will consist in evaluating the adequacy of this law. Each element of the law will be deemed adequate if it suitably covers the financial exploitation of the elderly. The third stage will consist in evaluating the efficacy of the elements of Canadian law and the extent to which the results fall short of the desired objective (eradication of financial exploitation). This discrepancy will be expressed by assigning a descriptor, graduated as on a Likert scale, to each element of Canadian law, with its efficacy being assigned one of four ratings: A: very effective; B: fairly effective; C: somewhat effective; or D: not very effective. Finally, the fourth stage will consist in building a conceptual framework to explain the assessed phenomena.

As the conceptual framework attempts to explain why it is so difficult to counter financial exploitation of the elderly, the methods used will be qualitative, since the authors of methodology manuals consider such methods to be those best suited for evaluating "why" and "how" questions (Babbie, 1995; Bickman and Rog, 1998; Denzin and Lincoln, 1994; Grawitz, 1996; Guba and Lincoln, 1989; LeFrançois, 1995; Patton, 1990; Shadish, Cook and Leviton, 1991). Of these qualitative methods, the case study is especially effective for answering this type of question (Stake, 1995; Yin, 1994, 1998).

Moreover, qualitative studies, and case studies in particular, do not usually dissociate the conceptual aspects from the factual aspects. From the qualitative standpoint, the theory also serves as a means of triangulation (i.e., of adding validity to the data gathered) (Patton, 1990). Especially in explanatory case studies, qualitative studies tend to link theory and facts, using the theory to explain the facts and the facts to correct the theory (Yin, 1994, 1998).

## 4. Results

### *4.1 The state of Canadian law with regard to financial exploitation of the elderly*

#### *4.1.1 The relevant provisions of the Criminal Code*

The abuses committed against the elderly are not necessarily any different from those committed against other adults, especially women. In this regard, the *Criminal Code* provisions governing crimes against property rights and fraudulent transactions apply as much to the elderly as to other age groups.

Thus, the *Criminal Code* has generally three objectives. The first is, if not to eradicate abuse, then at least to limit it by deterring abusers and the public through the imposition of sanctions proportionate to the seriousness of the offence. The second is to protect the public from violent crimes against persons and against property. The third is to rehabilitate the offender. For some years, a fourth objective timidly appeared with the adoption, in 1995, of section 717 which provides for the use of alternative measures to facilitate, among other things, restitution.

Parts IX and X of the *Criminal Code* are relevant to the protection of the elderly from financial exploitation, as they cover offences against rights of property and fraudulent transactions leading to contract. These parts of the Code cover the offences related to property theft (ss. 322, 328), breach of trust and breach of power of attorney (ss. 330-332), extortion (s.

346), fraud and false pretences (including the transfer of real property) (ss. 361-363; 380), and intimidation (ss. 423-424).

### *4.1.2 The relevant provisions of Canadian common law and Quebec civil law*

The objective of actions for tort is primarily to return the victim, to the extent that money can, to the same state in which they would have been had they not suffered certain kinds of abuse. As punitive damages are seldom awarded in Canada, the deterrent effect is secondary, but nevertheless important since the person obliged to pay money damages stands to lose a great deal, particularly if they are not insured. The termination of a transaction and restitution may also be ordered in the case of revocation of an unfair and unreasonable contract or one to which an elderly person has not truly consented. There are numerous provisions in common law and civil law pertaining to the financial exploitation of one party by another. These provisions are related to the problem of defect of contractual consent and are referred to in Quebec as "dol" (deceit or wilful injury) (Baudouin, 1993, p. 119).

Original common law made a distinction between legal incapacity and actual incapacity. Persons are deemed to have capacity to perform various legal transactions. It is therefore up to those wishing to withdraw from a transaction to prove either that the person was prohibited (declared unfit or incompetent, to use the common law term), or that in fact the person did not have the capacity to understand the nature or weigh the consequences of the transaction they entered into. Contrary to the *Civil Code of Québec* (s. 258), extravagance, in common law systems, has never constituted grounds for either prohibiting a contract or declaring it nul and void (Waddams, 1993, pp. 339-351).

Thus, in contract law, a transaction may be rendered void if and only if the victim can show that the consent was not theirs (*non est factum*), or it would be unfair and unreasonable to recognize the contract given the mental incapacity of one of the parties at the time of signing. The law governing mental incapacity may be likened to the general principles that allow for redress in cases of unequal bargaining power. This doctrine applicable to contracts means that if two people find themselves in a position in which one can abuse the other, and if one of the parties has in fact been abused by the other, the transaction resulting from such an iniquitous agreement will be rendered void. Among the factors that allow for a finding of unequal bargaining power are old age, affliction, alcoholism, advanced intoxication, drug use and lack of business experience (Waddams, 1993, pp. 339-351).

### *4.1.3 The relevant provisions of the laws governing guardianship of the elderly*

The laws governing guardianship and trusteeship were originally intended to protect persons who had become unable to manage their affairs or property. The new laws adopted by Alberta, Saskatchewan, Manitoba, British Colombia and the Northwest Territories are designed, among other things, to provide better protection for persons temporarily or partially incapable of managing their affairs or administering their property. As for the laws to protect the mentally ill, they are intended to protect the mentally ill and those who present a danger to themselves or others.

### *4.1.4 The relevant provisions of the laws governing protection of the elderly and abused and/or neglected adults*

Finally, the laws adopted by the Atlantic provinces to protect neglected adults, like the *Criminal Code*, are aimed at protecting the elderly against the various forms of abuse.

Most American states, followed by Canada's four Atlantic provinces, have adopted laws designed to protect elderly or disabled adults. These laws were initially intended to make up for the shortcomings of the laws to protect incapacitated persons, discussed earlier. These laws were also intended to protect elderly persons unable to care for themselves because of physical or mental infirmity.

## *4.2 Evaluation of the adequacy and efficacy of the law in protecting the elderly from financial exploitation*

As this is an evaluation of the adequacy of the law described in the previous section in protecting the elderly from financial exploitation, it is appropriate here to specify the criteria used to determine whether the various elements of the law are adequate for achieving the desired ends. Based on the elements mentioned in the description of financial exploitation and the situations covered by the various elements of the law, the following criteria may be established for identifying financial exploitation of the elderly: (a) persons incapable of administering their own property; (b) unlawful appropriation of property; (c) fraudulent transactions, undue influence; and (d) theft by someone having power of attorney.

### *4.2.1 The inadequacy of elements of Canadian law*

It is probably in the area of financial exploitation that, on the one hand, traditional Canadian law is most adequate and, on the other, the new elder protection laws are least adequate. Table 6 provides an overview of the adequacy of the various elements of relevant Canadian and Quebec law.

#### *4.2.1.1 The provisions of the Criminal Code*

The provisions of the *Criminal Code* cover all the various types of financial exploitation even though they are not aimed specifically at persons incapable of administering their property. In fact, parts IX and X of the *Criminal Code* adequately protect the elderly from financial exploitation as they cover offences against property and fraudulent contractual transactions. These parts of the Code cover offences related to property theft (ss. 322, 328), credit card theft (s. 342), breach of trust and breach of power of attorney (ss. 330-332), extortion (s. 346), fraud (including the transfer of real property) (ss. 361-363; 380), and intimidation (ss. 423-424).

The adequacy of the relevant provisions of the *Criminal Code* is demonstrated by the fact that several recent cases have been published dealing specifically with the conviction of individuals who financially exploited elderly people, notably, cases of property theft. Thus, in

the case *R.* v. *Irvin* (1987), the Appeal Division of the Nova Scotia Supreme Court upheld the conviction of a handyman who had agreed to do maintenance work for a weekly wage. One day, he entered the house and stole the sum of $1,040 from his elderly female employer, who was accustomed to keeping large sums of money in a hiding place. In January 1999, the New Brunswick Court of Appeal upheld the conviction of a housekeeper who, having won the trust of an 85-year-old couple for whom she worked, made off with $27,890 using her employers' credit cards and debit cards. The Court of Appeal not only upheld her conviction, but it changed the 8-month suspended sentence to an 8-month prison term on the grounds that she was a thief who had also used her relationship of trust to lay hold of the elderly couple's savings (*R.* v. *Adler*, 1999). In the case *R.* v. *Hamm* (1988), the British Columbia Court of Appeal upheld the one-year prison sentence of a tenant who had taken advantage of his landlord's stay in hospital to take $2,500 in jewellery and valuables. The Alberta Appeal Court also upheld the conviction of a 36-year-old man who had robbed his elderly parents of $52,000 in cold cash and Canada Savings Bonds worth $143,000. Thanks to the watchfulness of the police, only $500 was missing when the accused was apprehended. In view of the mental problems of this ungrateful son, the Court of Appeal upheld a one-day prison sentence followed by 3 years' probation (*R.* v. *Lienau*, 1986).

Some cases of fraud against elderly persons have also been published in the country's legal annals. In *R.* v. *Vanpatter* (1981), the Ontario County Court imposed a four-year prison sentence on a sales representative who had committed acts of fraud against seven elderly individuals totalling $88,000. The Prince Edward Island Supreme Court upheld the conviction and 15-month prison sentence of a man who, passing himself off as a social worker, had induced an elderly disabled couple to hand over to him the sum of $4,000 (*R.* v. *Gallant*, 1985). The Brisith Columbia Court of Appeal also upheld the conviction of a man who had done odd jobs for en elderly couple. Over a period of seven or eight months, he had managed to squeeze about $200,000 out of the couple without doing any substantial work (*R.* v. *Arnold*, 1994). Finally, in Saskatchewan, the Supreme Court handed down a one-year prison term, followed by 30 months' probation, to a woman who, claiming that one of her victims' children was in prison and needed money for bail, had squeezed the sum of $1,700 from elderly people. The Court also ordered full reimbursement of the amount to the victims, in payments of $60 a month (*R.* v. *Caron (L.)*, 1996).

Judges are especially harsh when an individual abuses the relationship of trust they have developed with seniors. The New Brunswick Court of Appeal, in *R.* v. *Adler* (1999), based its ruling in part on the fact that the accused had used her position of trust to take over the property of an elderly couple. The Alberta Court of Appeal did likewise in *R.* v. *Lalonde* (1985). In this case the accused, who acted as an advisor to an elderly woman, neglected his fiduciary duty to her by taking a sum of money to appease his love of alcohol and gaming. A 90-day prison sentence to be served on weekends was upheld because the accused turned himself in to the police, returned the stolen money and pleaded guilty. Several years earlier, Mr. Justice Laskin, then Chief Justice of the Ontario Court of Appeal, had upheld the conviction of someone accused of abusing his relationship of trust with an elderly woman, who was senile to boot, in order to get hold of her money (*R.* v. *Kribbs*, 1967).

In *R.* v. *Donald Georges Langs* (1981), the Ontario County Court handed down a nine-month prison term to someone for stealing less than $200 from an old man, among other things because of the person's criminal record, and especially because he had intimidated the old man and refused to give him enough money to take the bus home.

These few published criminal cases illustrate that the *Criminal Code* adequately covers the main economic offences that can be committed against the property of seniors, either through property theft, fraud or trickery, or breach of trust. These dishonest activities are generally more harshly punished when the victims are older persons.

#### *4.2.1.2 The provisions of common law and the Civil Code of Québec*

The provisions of common law and the *Civil Code of Québec* governing contractual relationships also adequately protect the elderly from financial exploitation and provide recourse for taking back property that has been stolen from them—actions for the recovery of unlawfully held property—, for having a fraudulent or deceitful transaction declared void, or even for obtaining money damages when the property misappropriated from its owner cannot be returned (Poirier, 1984; Giroux-Gareau and Manuel, 1999).

Bond and Penner (1995) reviewed the studies done in the United States on the efficacy of elder abuse laws. Only one dealt with financial exploitation: it was the study done by Sengstock and Barrett (1986) in which the authors asked lawyers at a legal clinic in Detroit to pull out from their files cases of elder abuse. Two of the five lawyers found that out of 77 cases of elder abuse pulled from their files over a two-year period, 30 were cases of financial exploitation. Of all cases of financial exploitation, 30% had required court action (divorce, revocation of the guardianship; filing of lawsuits), and 17% had required legal, but non-judicial action (transfers, powers of attorney, revocations); 50% had not required court proceedings, a letter threatening court action or other contacts having sufficed. In the lawyers' opinion, the situation had improved in about 66% of cases, whereas in about 30% of cases there was no change.

Given the research data, it can be concluded that common law and the *Civil Code of Québec* provide recourse that allow elderly victims of fraudulent real estate transactions or scams to successfully sue. It remains to be seen whether these theoretical remedies are effective from the viewpoint of the elderly who have been financially exploited.

#### *4.2.1.3 The laws governing guardianship and trusteeship*

The laws governing guardianship and trusteeship are also adequate in the sense that they cover the situations of persons incapable of administering their property and provide recourse allowing for the appointment of someone to administer the property of the incompetent. Guardians and trustees are in turn subject to strict standards governing the effective administration of the property for which they are responsible. The mental health laws also apply to persons not competent to administer their property, but only those admitted to psychiatric institutions.

#### *4.2.1.4 Special legislation to protect the elderly*

The elder protection laws adopted by the Atlantic provinces are designed to protect them from the various forms of abuse to which they are exposed. What is most surprising is that financial exploitation, which is the most widespread form of elder abuse, is not at all covered by the laws adopted specifically to counter elder abuse. This deficiency is especially inexplicable in the case of the Nova Scotia statute, given the fact that Girard (1988, p. 45-46) writes that the main motive for the neglect and abuse of the elderly is the lure of gain.

Only two provinces have adopted provisions designed to protect the elderly against financial exploitation: British Columbia and Manitoba. British Columbia's *Adult Guardianship Act* (1993) defines abuse as "the deliberate mistreatment of an adult that causes the adult physical, mental or emotional harm or *damage to or loss of assets*." Manitoba's *Act respecting vulnerable persons who are mentally handicapped* (1993) stipulates that abuse means "mistreatment, whether physical, sexual, mental, emotional or financial or a combination thereof, that is reasonably likely to cause death, or that causes or is reasonably likely to cause serious physical or psychological harm to a vulnerable person, or significant loss to his or her property."

**Table 6**

**Evaluation of the adequacy and efficacy of Canadian law in protecting the elderly from financial exploitation**

| Protection against financial abuse | Cr. Code | | Common law | | Guardianship & trusteeship | | Mental health | | Protection of the elderly | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Eff. | Adeq. | Eff. |
| 1) Persons incapable of administering their property | | | | | X | D | X | A | | |
| 2) Unlawful appropr. of property | X | D | X | D | | | | | | |
| 3) Fraud, undue influence | X | D | X | D | | | | | | |
| 4) Theft by someone having power of attorney | X | D | X | D | | | | | | |

Legend: Adeq. = Adequate: is adequately covered by the area of law concerned
Eff. = Effective: achieves the desired objective
X = Is adequately covered by the area of law concerned
A = very effective; B = fairly effective; C = somewhat effective; D = not very effective; ? = cannot be evaluated

### *4.2.2 The ineffectiveness of the elements of Canadian law*

#### *4.2.2.1 The efficacy of criminal law*

While the provisions of the *Criminal Code* adequately prohibit the financial exploitation of the elderly, how effective are they in this regard? On reading Table 6, it will be seen that the provisions of the *Criminal Code* are not very effective in combatting the most common form of elder abuse, namely, financial exploitation. In fact, the 1996 Canadian police statistics analysed by Bunge and Levelt (1998) show that physical assaults made up the vast majority of crimes (91%) committed against older adults by family members. It can therefore be concluded that even though financial exploitation is three times more common than physical abuse, it was reported ten times less often than physical assault. This is sufficient for arguing that the *Criminal Code* is not very effective in this regard.

Bond and Penner (1995) conclude that in Canada in particular, the ineffectiveness of the criminal law is owing to the lack of police involvement in cases of financial exploitation. In their view, this lack of interest on the part of police is owing to their limited success when these cases reach court. However, Zuzga (1996), a prosecutor for Los Angeles County, writes that the main reasons for the limited effectiveness of the criminal law are as follows: (1) financial exploitation of the elderly is often discovered after the older person dies, making prosecution impossible; (2) it is quite difficult to prove that the abuser intended to steal money from the elderly person; (3) there is a lack of resources and specialized personnel to investigate cases of financial exploitation; (4) there is a problem determining who is to be held criminally liable for the abuse when several people are involved; (5) it is difficult to establish a causal link between the presumed abuser and the criminal act; (6) there is a problem of paying physicians and experts to come and testify; (7) it is difficult to get older persons to testify, because they feel excluded from the judicial system and often become anxious when testifying or under cross-examination. Ashton (1995) draws similar conclusions. Robertson (1995) writes that "[t]he main reason is the considerable reluctance or inability of the person to file a complaint or testify . . . . Moreover, the police and Crown prosecutors are at times not inclined to prosecute a suit and it is difficult in some cases to gather all the evidence to prove culpability" (p. 84) [translation].

#### *4.2.2.2 The efficacy of Canadian common law and Quebec civil law*

With regard to the efficacy of the civil remedies available in Canadian common law and under the *Civil Code of Québec*, while the law adequately covers financial exploitation, its efficacy is a whole other matter. While the lawyers consulted may consider the law to be effective in about two thirds of cases (Bond and Penner, 1995), needless to say the situation may be quite different when no lawyer is consulted. Poirier (1992) undertook to verify the efficacy of the remedies available under the law of contract in Canadian common law in cases of older persons who had transferred their property to their children in return for the children's promise to house and care for them until the end of their days, and this promise had not been kept. Of the 20 cases identified by gerontology students in the French-speaking regions of New Brunswick, three legal scholars independently evaluated the chances of success of each case if it were taken to

court. All three agreed that in 17 of the 20 cases, the older persons would have won their case. Of the 17 cases likely to have received a favourable ruling from the judicial system, steps had been taken by the elderly in 6 (35%): in 4 cases, the older persons had filed a suit, and in 2 other cases they had settled amicably. The author estimates that in 55% of the cases, the elderly exercised no recourse even though they had been given good chances of success.

The main reasons cited by the elderly for not prosecuting their suit are numerous. In a study of a random sample of 200 seniors in British Columbia, Spencer (1996) reports that (1) the elderly considered it their duty to help their children in need by lending them or their grandchildren money at no interest; if the money was not paid back, they assumed the loss without a word. In fact, less than 5% were prepared to take legal measures in the case of non-payment. According to the author, (2) 32% of respondents said they had less energy and time to spend in legal or other proceedings and that it would diminish their quality of life (p. 14). Another reason cited by authors (Langan and Means, 1996; Poirier, 1992): (3) the desire to hand their money down to the next generation rather than leave it to the government in the form of payment for accommodation in a nursing home. Langan and Means (1996) also state that other reasons why victims of financial exploitation do not take action are: (4) relatives and professionals are not aware of the available options, with the result that they sometimes take actions that some may see as financial exploitation; (5) the evaluation and collection of money from this group of persons poses real problems for social service agencies. Eisenberg (1991) estimates that the reasons why the elderly do not sue their children when they have been financially exploited include: (6) they think it is improper to sue relatives; (7) they are afraid of the judicial system, which is very complex; (8) the considerable costs involved, notably, lawyers fees, especially when there is no civil legal aid (p. 82), and lawyers do not want to sue because old people have no money and the case may well not be very profitable given the amount of work involved (p. 83-84); and finally, (9) the relevant law is complex, and few lawyers have a thorough knowledge of the law governing financial exploitation.

Several suggestions have been made, notably in the United States, for reducing some of the problems encountered by elderly victims of financial exploitation. Hankin (1996) mentions a law adopted in California in 1992 for the payment of lawyers in suits against elder abusers. Under the new law, called the *Elderly Abuse and Dependent Adult Civil Protection Act*, the lawyer must convince the judge that the abuser was guilty of gross negligence, fraud or malice in committing certain types of abuse, notably financial or physical abuse or neglect. If he succeeds, the lawyer can win money damages for his client, including general damages of up to $250,000. Furthermore, all costs related to the trial, notably fees for the lawyer, expert witnesses, and so on, are covered in a second judgment. A single judge decides without the help of a jury. Others (Poirier, 1992) have suggested that legal aid be made available—notably in those provinces where it is not—for seeking legal redress in cases of financial exploitation.

Schmidt (1993), in examining the need for lawyers to be accountable to elderly clients, especially the most vulnerable among them, suggests adherence to the *Model Rules of Professional Conduct* which stress the obligation of lawyers to provide to the elderly legal services of the same quality as those provided their most affluent clients. Moreover, Poirier

(1990) also stressed the obligation of lawyers-notaries in common law provinces to be vigilant on behalf of elderly persons who want to transfer their property to their children, and above all, not to act for both parties at once. The New Brunswick Court of Appeal severely reprimanded a lawyer who had acted for both an old man and another individual (*Gammon et al.* v. *Steeves et al.*, 1988). More recently, a Court of Queen's Bench judge annulled a deed of transfer by a father to his son on the grounds that the lawyer was acting essentially for the son in the transaction (*Goguen* v. *Goguen*, 1992). Blunt (1993) suggests, moreover, suing professionals (lawyers, accountants, bankers, etc.) who, directly or through negligence, participate in the financial exploitation of the elderly.

#### *4.2.2.3 The efficacy of the laws governing guardianship and of mental health laws*

The laws governing guardianship and trusteeship may prove fairly effective in countering the financial exploitation of the elderly. Robertson (1995) writes that these laws allow for the appointment of a trustee with the authority to take decisions in the person's behalf. He feels, however, that these laws are ineffective because the apply only when the adult is losing their mental capacity to manage their property.

However, guardianship and trusteeship may prove more effective solutions for elderly persons of declining autonomy than for the population as a whole. Wilber (1990) refers to the fact that Schmidt et al. (1981) and Steinberg (1985) found that various forms of financial exploitation were experienced by nearly one third of the clients referred to public trustees in the United States. In addition, Wilber (1990) reports a study of 63 subjects age 60 or older who had been referred to the Public Trustee and the adult protection services of Los Angeles County. The subjects were visited every 6 months over a period of 12 to 24 months and interviewed to assess their cognitive ability and the support services available to them. In 27 of the 63 cases (40%), various forms of financial exploitation were confirmed.

Some researchers have found that abuse of the powers granted by powers of attorney, including use of a joint bank account, was one of the most common forms of financial exploitation. Sacks (1996) asked 200 health and welfare agencies and nursing homes to assess the different services that administer the money they dispense. When asked what the most common types of financial exploitation were, respondents identified, first, forgery (89%), followed by money theft (78%), abuse of power by pilfering funds held in a joint account (78%), and abuse of power of attorney (44%). Robertson (1995) also warns against the possible dangers of powers of attorney in the event of incapacity because, firstly, they give the proxy considerable powers, and secondly, most provinces do not require adequate supervision when a power of attorney comes into effect, in terms of the proxy's obligation to account for the way in which they manage the principal's property. The author states that the strictest laws in this regard are those of Alberta (*Power of Attorney Act*, 1991) and British Columbia (*Representation Agreement Act*, 1993), which require that powers of attorney be registered in a central registry.

To limit financial exploitation, notably through powers of attorney, Sacks (1996), like Robertson (1995), recommends passing legislation increasing the protections in proxies against

financial exploitation, notably by granting the public trustee broader powers. Blunt (1993) suggests, moreover, several ways of avoiding financial exploitation by insisting that more than one person be designated co-proxy, one of which might be a trust administered by competent persons.

#### *4.2.2.4 The efficacy of laws to protect the elderly*

The elder protection laws adopted by the Atlantic provinces do not cover financial exploitation and are therefore completely ineffective in protecting the elderly from such abuse. Robertson (1995) recalls that although these laws are intended to provide a means of protection for seniors who are unable to care for themselves, the laws of the Atlantic provinces, unlike those of most American states, provide no protection against financial exploitation. The author, however, praises British Columbia's *Adult Guardianship Act*, which now covers financial exploitation, of which he says "there is every indication that the path chosen in British Columbia will be followed by the rest of Canada" (p. 90) [translation].

Gordon (1986) develops a different perspective on the efficacy of the laws for protecting the elderly against financial exploitation. In answer to the question, "Why adopt new laws rather than use the *Criminal Code* and stress the application of the Code?", he provides the following explanation. With protective intervention, the elderly person can be placed under State supervision without considering the impact on the individual. Once guardianship has been granted, the staff of social agencies have only to send the older person's money to the public trustee to pay the costs of meeting the person's needs (notably, for nursing homes). In so doing, social agencies ensure a universal and effective means of protecting the property of the elderly, and these elderly persons are not dependent on the State.

## 5. A conceptual framework to explain the phenomenon: normative pluralism

The need to take into account the various modes of social regulation, including the law, whose influence is increasingly pervasive, has prompted sociologists to propose the notion of normative pluralism (Weber, 1986). Sociologists of law, who have contributed greatly to the development of the issue of normative pluralism, have also dubbed it legal pluralism (Arnaud, 1988; Belley, 1986, 1998; Ehrlich, 1975; Gurwitch, 1968; Rocher, 1988).

There are several versions of normative pluralism. However, studies of relationships of dependence and interdependence may be identified at two levels. There is the microsocial study of the interpersonal relationships between the elderly and their descendants or between the elderly and the professionals who work with them (social workers, police, physicians, psychologists, etc.). And there is the macrosocial study of the overall social system at play in the social regulation of the relationships between the elderly and various professionals (social workers, psychologists, physicians, police, etc).

### *5.1 Normative pluralism in interpersonal relationships*

Most of the pioneers of legal pluralism have focussed their efforts on the most readily observable aspect of normative pluralism, namely, the individual and their relationships with the various social systems. One variant of normative pluralism (legal pluralism) is concerned in particular with the regulation of individual behaviours. It is primarily this function that Jacques Vanderlinden (1993, 1998) and Roderick Macdonald (1998) ascribe to legal pluralism. This model of normative pluralism postulates, then, that there are several social systems, of which the State legal system is the fullest expression, or the archetype, according to Guy Rocher (1988). This archetype serves as the benchmark against which the other social systems are analysed. Normative pluralism, introduced by Weber (1986) and updated by Côté and Rocher (1994) and Rocher (1996), postulates that several social systems may interact simultaneously to regulate a specific situation or individuals.

Burns and Flam (1987, pp. 13-14) also join in this acceptation of normative pluralism, since these authors consider that systems of rules are organized to structure and regulate social transactions, the conduct of activities, the completion of specific tasks, or interaction with others in a socially determined way. This new wave of sociologists, after the fashion of Burns and his colleagues (Burns and Flam, 1987; Burns, Baumgartner and Deville, 1985; Burns and Dietz, 1992; Woodward, Ellig and Burns, 1994), think that all social organization may be conceptualized as a set comprised of numerous subsets of social regulation. The system of social regulation may be thought of as a series of rules. Burns and Flam (1987, pp. 13-14) note that human activity is in fact largely dependent on socially determined rules, and these systems may even constitute the deep-lying structure of human history. Some think that systems of rules, like a grammar, make it possible to understand social actions. This grammar is used by the people belonging to a given society to structure and regulate the transactions between them in specific situations and spheres of activity. From this standpoint, the law is merely a subsystem of the social system that must hold its place in the overall theory of social regulations (Arnaud, 1981, pp. 322-387; Côté and Rocher, 1994; Commaille, 1986; Commaille and Perrin, 1985, p. 109; Rocher, 1996).

This approach to normative pluralism explains how several different social systems (domestic or family norms, professional norms of protection workers, territorial norms or laws) may offer diverse solutions for tackling the problem of the efficacy of the law with regard to the financial exploitation of the elderly. When professionals (social workers, police, prosecutors, judges) face conflicting values or norms, they usually fall back on those advanced by their profession. This response is motivated by the fact that a professional who does not adhere to the norms of his profession may be the subject of a complaint to his profession's conduct committee and risk suspension of his right to practice. Moreover, in contemporary societies, the law plays an increasingly important role in regulating the conduct of professions.

## *5.2 The normative pluralism of social structures*

While the pioneers of legal pluralism were particularly interested in the effects of normative pluralism on individuals or groups, many contemporary thinkers have dwelt on the production of these various social systems and the interactions and influences they can have on each other.

### *5.2.1 Boaventura de Soussa Santos' cartography of social systems*

Beginning with legal pluralism and adding the concept of power developed by Foucault (1975), Boaventura de Soussa Santos (1985, 1988, 1995) develops a cartography of law to account for the power relationships within social structures as well as those between the State and the social structures concerned. The author identifies four structural spaces, each of which has a corresponding form of law. According to the author, domestic law governs families, the law of production governs the labour market and production, territorial law governs individuals and the State, and systemic law is concerned with the nation and international trade.

According to De Soussa Santos, the family functions like a patriarchy; consequently, the power is vested principally mainly in the man, who is the head of this social structure. The legal system constituted by the family produces its own normative rules. These rules are not produced by each family unit, but by the overall social structure known as the family within a given society, which may be referred to as the "familial legal system."

### *5.2.2 Luhmann's social systems*

Like De Soussa Santos, Luhmann (1983, 1985, 1995) tried to explain how the various social systems are reproduced. Unlike De Soussa Santos, Luhmann postulates the existence of six social systems: economics, law, politics, science, religion, and education. According to Luhmann, each of these social subsystems (normative systems) has a particular means of communication, a code and a program. Thus, law communicates by means of norms, its code falls within the legality/illegality dyad, and its program takes the form of laws. In the case of science, the means of communication is truth, its code is the truth/falsehood dyad, and its program takes the form of theories.

Luhmann (1983, p. 994) maintains that despite the interest that the description of the different social systems (normative systems) may represent, the main problem is understanding how a system manages to reproduce itself in an environment that is not necessarily favourable to its reproduction. In other words, an attempt must be made to understand how a social system manages to convert noise into information that enables it to keep the internal self-referential process going. Niklas Luhmann proposes his theory of autopoiesis in answer to this question. This theory is borrowed from biology and applied by Luhmann to social systems.

In introducing autopoiesis (self-reference) into the theory of social systems, Luhmann (1985) writes that self-reference does not apply only to the self-programming of computers.

According to Luhmann (1985, pp. 281-282), autopoiesis means that self-referential systems themselves produce each type of unity they need and use, including the unity of the system and its elements. What is characteristic of self-referential systems is that they themselves produce and determine the operating unity of their elements through their own elements; hence, the unity of this process of autopoiesis.

One of the consequences of autopoiesis, according to Luhmann (1985, pp. 283-284), is that society, and each social system—including the legal system Luhmann uses as the archetype of self-referential systems—forms a normatively closed system that produces its own elements having legal relevance by virtue of the fact that the system, with the help of its elements (e.g. birth, death, accident, actions, decisions), gives them a normative quality. These elements acquire special status which is relevant only to the legal system based on the normative context within which they are elements on which other elements, in turn, depend. However, not only are society and its legal system closed systems; they are also systems cognitively open to their environment despite, if not precisely because of, their being closed. The main consequence of autopoiesis is that a normative quality originating in the environment cannot be introduced into the system, so that in the case of the legal system, the normative quality comes from neither the environment generally (nature), nor a social environment such as religion or morality. Knodt (1995, p. xxix) writes that the only norms Luhmann considers as such are those created by the process of autopoiesis within relatively closed systems.

### *5.2.3 Interaction between the various social systems: the rationality specific to each*

Each legal system is also characterized by its own logic or rationality. It is Weber who is to be credited with developing the notion of rationality. He uses it to "qualify a specific modality of the ways of behaving: those of the type he calls rationality of means in relation to a given end" (Haba, 1988, p. 339) [translation].

When several legal systems are present, their norms may conflict. To identify those belonging to this or that legal system, it is necessary to go back to their respective rationality. Each rationality is the expression of a system of reference. It flows from a vision of the world, a philosophical bias or a political line. To trace this legal reason, one must therefore trace the main organizing principles of the law or their more profound and unconscious structures; in other words, discover the contextual events that produced them. Only the elements accepted into the system that governs a rationality and are rationally related to it will be accepted.

François Ewald (1986) is a colleague of Foucault who applies Foucault's thinking and method to the problem of legal rationality. For him, any social practice is reflected according to a certain type of rationality. Now, "the law is a technique of judgment," but also a "practice of rationality which has the characteristic of providing a reference that is required of, i.e., certain to different social practices" (p. 37) [translation]. According to Ewald, this notion of law "allows for the proposal of an acceptable solution to the problem of law-society relationships: it allows one to consider both the autonomy of the law and its social context" (p. 36-37) [translation].

By studying the rationalities at work in the various legal systems, one should be able to discover the link between law and other psychosocial practices, and their mutual influences. Ewald (1986, p. 37) estimates that the mysterious link between the legal system and its social conditions of possibilities turns on the notion of rationality. The concept of rationality is therefore a means of understanding the link between the various legal systems, and between law and other types of social practices. By studying rationalities, it is possible to discover the various social practices at work in law, and thus to understand how they influence each other.

### *5.3 The application of normative pluralism to the problem of protection of the elderly from financial exploitation by their descendants*

The normative pluralism developed by sociologists and legal scholars in the 20th century could be applied to the problem of financial exploitation of the elderly by their descendants. It might lead to an understanding of why it is so difficult to combat this form of elder abuse.

It was observed earlier that the three main reasons for the difficulty in combatting financial exploitation of the elderly by their descendants are: inadequacy of the law, ineffectiveness of the law, and family values. Each of these reasons might be expressed according to the legal system to which they belong: the State legal system, the various professional systems (police, social workers, prosecutors, judges) responsible for enforcing existing laws and making them effective, and the familial social system. In order to express these realities in terms of social systems, it is appropriate to bring together all the elements put forward by De Soussa Santos and Luhmann.

#### *5.3.1 The State legal system*

In terms of legal systems, it could be said that the law is an important legal system here since all the critics, especially social workers, point to the inadequacy and ineffectiveness of the law as the main problem in effectively protecting the elderly from financial exploitation. According to these critics, to overcome the problem, it would suffice to replace the traditional law (relevant provisions of the *Criminal Code*, law governing guardianship and trusteeship, law governing protection of the mentally ill) with laws better suited to the particular situation of elder abuse.

According to Luhmann (1985), the State legal system is one of the most important social subsystems. Given that each subsystem is relatively autonomous, each has its means of communication and codes. The legal system communicates by means of norms whose code is the legality/illegality and justice/injustice dyads and whose program is found in laws or judicial decisions, notably, but not exclusively, in the common law legal system.

The judicial social system has its own logic which is expressed differently depending on whether the judges interpreting it lean towards natural law or positivism. Natural law emphasizes principles such as the inviolability of the person enshrined in the *Canadian Charter of Rights and Freedoms*, while positivism emphasizes the specific wording of the law. The latter,

according to the social actors who advocate it, may emphasize concepts foreign to traditional legal logic. Through legal positivism, the legal system becomes open to other social systems, notably professional social systems that may succeed, through the law, in infecting the legal system with their world visions, as social workers in the Atlantic provinces have done by having laws adopted specifically to protect the elderly.

A number of judges have adopted a positivist attitude and refused to challenge the merit of legislation that incorporates the social and somewhat paternalistic notion of intervention practised in the interest of the elderly (Poirier, 1991). This jurisprudential trend is still very present, even in recent legal rulings.

A trend towards natural law is, however, evident, particularly since the late 1980s with the coming into force of the *Canadian Charter of Rights and Freedoms*. With the Charter, a new rule of thumb was introduced into the interpretation of laws. This new rule of thumb, which tends towards natural law, has not yet replaced the positivist rule that confines the judge to the text and denies him the right to assess legitimacy and legality based on a higher standard of law. Judges who lean towards the natural law approach find the defence of the inviolability of the rights of the individual incompatible with laws designed to protect adults, except when the desired social objectives are achieved through means deemed reasonable and proportionate to the objectives (*R.* v. *Oakes*, 1986). Measures that are limited in space and in time by criteria sufficiently specific to identify the group of persons in question will be deemed reasonable (R. v. *Swain*, 1991). These criteria include mental incapacity and the element of danger to the health or life of the individual or others (Poirier, 1991).

As our society has not completed its ideological turn, both approaches to rendering judgment still coexist. If the natural law trend continues, the model advocated by social workers, and described by some as the "therapeutic State" model, which supports legislation to protect the elderly or disabled, may be demolished. Applying Luhmann's model of normative pluralism, it could therefore be said that the legal system has not been influenced by the other social systems, even when those systems attempted to use the law for their own ends if these ends conflicted with traditional legal reason.

### *5.3.2 The professional social system*

The professional social system might be equivalent to the social system referred to by Luhmann (1985) as the scientific social system. According to Luhmann, the means of communication of this social system is the reproducible truth or, in the words of Popper (1968), the falsification process. Its code is expressed by the science/myth dyad, and the best-interest-of-the-person/autonomy dyad. For scientists, whose vision was expressed most clearly and completely by Skinner (1970), anything not scientifically proven is relegated to the sphere of myth. Autonomy and personal freedom would therefore qualify as myth, since these notions are not proven. However, professionals, trained in the scientific school, claim to have knowledge and are therefore in a position to decide what measures to take in the best interest of the persons who consult them. Finally, the scientific world expresses itself through theories.

Two aspects characterize the practice of psychosocial support workers who work with the elderly: professional standards—or the scientific authority in which they are enveloped—and the power and authority vested in them by the law (Compton and Gallaway, 1975; Dingwall et al., 1983; Day, 1981; Poirier, 1986). Both these aspects apply equally to social workers and to police officers who work to protect the elder.

Social work is a relatively young profession. While today it encompasses numerous helping functions, of which the protection of vulnerable persons is just one, it developed in the early 20th century in the context of child protection (Day, 1981, p. 100 ss). Since the early 1980s, its professionals have also extended their methods to the protection of the elderly. In the case of both youth protection and elder protection, social workers have taken on a job initially done by police. But while the police stress their function as gatekeepers, social workers stress the fact that their primary function is to help their fellow citizens resolve their interpersonal problems and become more autonomous (Bartlett, 1970; Duplantie and Robichaud, 1976; Laforest, 1984), even though much of their work, like that of the police, in fact also consists in protecting children and the elderly (Baccouche, 1982; Day, 1981, p. 81; Lasemann, 1979; Renaud, 1978; Satyamurti, 1979). Given their ideological orientation, helping professionals prefer to work in a context in which those they help voluntarily accept the services provided. Some even maintain that no helping relationship is possible in a context of supervision or social control (Carniol, 1984; Day, 1981, p. 85).

In *Surveiller et punir*, Michel Foucault (1975, p. 310-311) notes that a new economy of power is accompanied by a new form of "law"—a hybrid of legality and nature, prescription and constitution, the norm—from which follows a whole series of effects: the internal dislocation of judicial authority, or at least its functioning; greater difficulty in judging, and even shame in sentencing; a tremendous desire among judges to assess, appraise, diagnose, recognize the normal and abnormal; and the claimed honour of healing and rehabilitating.

Psychosocial professionals who work in the area of protection of the elderly and disabled in effect are acting as agents of social control. To enable them to carry out their protective work, the law therefore grants them broader powers than the *Criminal Code* grants police officers (Poirier, 1986, p. 231-232; 1988, p. 174-175).

Protection of the elderly requires that psychosocial professionals integrate the various social systems to which they are subject. Major conflicts may well arise between the professional norms, which stress work in a context in which the client voluntarily agrees to the professional services, and the legal norms, which stress intervention even against the client's will. One way of resolving this conflict is to grant psychosocial professionals considerable discretionary powers to act in the best interest of individuals who refuse their services. That is why, with regard to the emergence of the law, social workers have recommended that the laws to protect children and the elderly grant them considerable discretionary powers, thereby obviating the need to obtain judicial authorization to intervene (Cruikshank, 1981; Poirier, 1986, p. 225-228; 1988, p. 175).

According to Foucault (1975, p. 300-311), social control is as much the work of social workers as the work of the law. Whereas the police ostensibly use the authority the law gives them to exert social control, the other medical and psychosocial workers use a model more in keeping with their professional values, while asking the law to legitimize their approach (Cohen, 1985, p. 21-39; Donzelot, 1977, p. 96-98). As Foucault said (1975, p. 310) in speaking of the powers granted the new psychosocial professions: in its function, this power to punish is not fundamentally different from the power to heal or educate. It receives from them [the professions], and from their minor and small work, a guarantee from below, but which is no less important, since it is that of technique and rationality. The prison system "naturalizes" the legal power to punish just as it "legalizes" the technical power to discipline.

In advocating the adoption of laws that treat the elderly like children, social workers have redefined the problem of elder abuse in terms they understand. In so doing, they have excluded the police, who have quite simply gotten out of the field of elder protection, leaving it to the social workers.

### *5.3.3 The familial social system*

De Soussa Santos (1985) studies the familial social system as one of the four main social systems. Luhmann refers to the educational system in the broad sense, which is similar to the familial social system examined by De Soussa Santos. The means of communication of the familial social system is the model on which it has developed; in our Western societies, the family model was, and still is, patriarchal. The code of the familial social system is built on the following dyads: family members/outsiders, and private/public. Although Luhmann refuses to attribute a mode of expression to the educational system, on reflection, it could be said that the familial social system is expressed through affective values.

According to the logic of the familial social system, events caused by family members that are likely to undermine other family members are kept within the family community and do not extend into the public domain and therefore to outsiders, in order to maintain the unity and integrity of the family nucleus.

### *5.3.4 Interaction between the various social systems to protect the elderly from financial exploitation*

When Luhmann argues that every legal system is self-regulating and is influenced only by its own elements, this assertion might be translated into Weberian terms as follows: each social system is governed by its own logic. Thus, with regard to protection of the elderly from financial exploitation, the various laws adopted to this end cover the various problems adequately to achieve their aim. Moreover, these same laws also accord the various interveners the powers that enable them to fulfil the laws' objectives. Laws aimed specifically at protecting the elderly, such as those of the Atlantic provinces, cause problems of legality; these legislative norms grant social workers such broad powers, some feel there is a danger they will abuse them and that such powers should be declared contrary to the *Canadian Charter of Rights and*

*Freedoms* and, consequently, to juridical logic (Coughlan et al., 1995, pp. 86-110; Gordon et al., 1987; Gordon and Verdon-Jones, 1992; Macdonald et al., 1988; Hortsman, 1975; Poirier, 1986, 1988; 1991; Regan, 1981). It is as though, through social legislation, a logic had been introduced into law which is foreign to it and which it must reject or risk losing its juridical autonomy.

Because of the professional values contained in professional standards, social workers see themselves as professionals who work with clients who willingly submit to their advice and help, rather than as people who exert control over their clients, as the police do. The problem, however, lies in the fact that social workers, when working in the field of elder protection, are also doing police work. But they refuse to acknowledge the extent of their social control. This underlying schizophrenia of social work is, moreover, carefully articulated by social workers in a way that discredits police officers who intervene where the elderly are concerned. Social workers rightly point out that the police are not effective in their efforts to counter the financial exploitation of the elderly because they see themselves as outsiders who must interfere in the family's privacy. Social workers bring to their protective work milder methods that are more oriented towards the individual and their family. Families consider these approaches more familiar and less foreign, and may therefore have a greater affinity with the standards and family values, thereby justifying the approaches proposed by social workers.

## 6. Recommendations: How to effect change in the protection of the elderly from financial exploitation

This study has shown that the law currently in force is essentially adequate for combatting financial exploitation of the elderly. The problem is one of ineffectiveness in the application of the current law. The real question our society must address is how to make the current law more effective in protecting the elderly from financial exploitation.

The conceptual model of social systems presented above has the advantage of pointing up the fact that the different social systems tend to function according to their own logic, without necessarily being influenced by the norms of the other social systems around them. According to this conceptual model, one social system can only influence another if the first integrates the elements of the second according to its own logic, making them its own. Thus, although the standards elaborated by the State legal system are relatively adequate, they may be entirely ineffective if the professional social system of social workers and police does not integrate them and put them into practice.

The problem in this regard is twofold. Firstly, social workers, while they have managed to have laws adopted permitting them to intervene in the case of abused older persons, have excluded financial exploitation from these laws because they did not feel equipped to apply them. Secondly, the potential conflicts between social workers and police may very well weaken the effectiveness of the latter with regard to financial exploitation of the elderly. In presenting all phenomena of abuse towards the elderly—including financial exploitation—as a single problem that is more a matter of concern to social services than to police, social workers have in a way

relieved the police, who are the agents for enforcing the relevant provisions of the *Criminal Code*, of their responsibilities.

There are two approaches to solving this component of the problem. Firstly, if it is decided to make elder abuse a problem that falls solely to social workers, this abuse must include financial exploitation and social workers must have effective means of combatting it. We, and a number of others, do not think this is the best strategy. The second approach would be to place responsibility with the police, Crown prosecutors and the governmental authorities on which they depend, so that their obligation to combat elder abuse is clearly attributed to them, given that these various types of abuse fall under the *Criminal Code*. It is precisely this approach that some American states, notably California, have adopted and that the Ontario government was preparing for before the May 1999 elections. As has been seen in the case of violence against women, this approach is more likely to succeed than that used by social workers.

With respect to the professional social system, it is therefore important that governments make some decisions. They must decide, firstly, which professionals are responsible for applying the laws governing financial exploitation. Secondly, once this has been decided, protocols must be established for police, Crown prosecutors and social workers for applying these provisions, so that each knows and carries out its role. Thirdly, political decisions must be made to inform the public and those responsible for applying the laws that the various forms of financial exploitation constitute offences that will no longer be tolerated. This, in fact, is the model that was put into effect to combat domestic abuse, including incest.

Finally, neither the State legal system nor the professional social system has yet managed to influence the familial social system, which insists on keeping private and beyond the reach of outsiders (social workers, police, etc.) the problem of financial exploitation of the elderly by family members. It is mainly in this regard that the discrepancies between the norms of the different social systems are most difficult to reconcile. How will the other social systems—notably, the State legal system and the professional social system—succeed in influencing the familial social system? It will be necessary to adhere closely to the logic of the familial social system, which stresses privacy, family relationships, family values. The relative success of social workers in the area of physical abuse of children and the elderly is doubtless attributable to an approach centred on empathy and on helping to solve the problems within the family. However, the protective work of police and social workers is often perceived as outside interference in the private life and values of the family.

To ensure greater chances of success, forced reliance on measures deemed foreign to the familial social system should probably be avoided. Thus, instead of criminal actions followed by trials, the alternative measures permitted by section 717 of the *Criminal Code* may have greater success in cases of financial exploitation of the elderly by their descendants. Similarly, in civil suits, the reliance on extrajudicial means of dispute resolution—notably, for those who do not want to demand their rights in court—would be consistent with the values conveyed by the familial social system.

Finally, the familial social system is not at all impervious to the other social systems, and a vigorous public information campaign against financial exploitation of the elderly might prove as successful as similar campaigns against domestic abuse. The use of peers—elderly citizens—to pass on the message against financial exploitation has also proven beneficial, because the logic used to convey the message is more in keeping with the values of the familial social system.

## GENERAL CONCLUSION

This study was devoted to describing the different elements of Canadian and Quebec law in effect apt to combat the various forms of elder abuse. Five main elements of Canadian and Quebec law are relevant in this regard: the various provisions of the Canadian *Criminal Code;* the provisions of common law and of the *Civil Code of Québec*, the provisions governing guardianship and trusteeship, the laws to protect the mentally ill, and the laws adopted in the Atlantic provinces to protect older persons who are abused and neglected.

Our evaluation of the adequacy of the different elements of Canadian and Quebec law leads us to believe that, as a general rule, the current legal provisions are adequate for combatting the various forms of elder abuse, without the need to adopt special legislation to protect neglected adults such as the Atlantic provinces have.

It goes without saying, however, that the laws of some provinces could be improved. Legislative amendments should be adopted, notably in New Brunswick and Prince Edward Island, to protect the rights of the elderly—and the general population—when it comes to recognizing powers of attorney in anticipation of incapacity, in order to ensure that the patient's wishes are respected by medical staff. Moreover, better protection of the rights of the elderly living in long-term care facilities might be modelled on the Ontario statute stipulating the rights of nursing home residents. The protection of the rights to intimacy and privacy of the elderly—and of the general population—could be guaranteed by provisions similar to those of Quebec, or at least similar to those adopted by Canada's western provinces. Finally, the mechanisms for overseeing the coming into effect of, and the accountability of proxies named in, powers of attorney in anticipation of incapacity similar to those in effect in the United Kingdom and Alberta might be apt to limit the abuse of power by proxies who financially exploit older persons.

While most authors acknowledge the adequacy of the law in protecting the elderly against the various types of abuse, they generally admit that the existing law is not very effective in countering abuse. The main problem is one of implementation of the existing statutory and legal provisions. Thus, in criminal law, the provisions of the Canadian *Criminal Code* adequately cover most forms of abuse, with the exception of neglect. The problem is one of application. First of all, with regard to elder abuse, our society is not yet beyond the stage it was at in 1980 with respect to violence against women. As physical abuse of the elderly is in fact spousal abuse, the means used should be the same as those that have been in effect since the mid-1990s to combat domestic abuse.

Steps similar to those taken to combat domestic abuse should be taken to combat the different forms of elder abuse, notably: (1) the introduction of a large-scale program of public education on the various types of elder abuse; (2) the establishment of training programs for the police generally, or at least for small groups specialized in the elderly; (3) the provision to careworkers, notably police and Crown prosecutors, of protocols for handling complaints of

various forms of elder abuse; (4) a clear and unequivocal political will on the part of politicians and those responsible for enforcing the laws; (5) since the elderly are reluctant to use traditional legal recourse, full use of the provisions of section 717 of the *Criminal Code* authorizing alternative measures. If there is one area where these measures are appropriate and could be effective, it is elder abuse. Since in the most cases older persons want, not to punish their children, but rather to recover their property or reach an amicable understanding with their children, the use of these provisions, notably mediation, should be encouraged.

With respect to Canadian common law and the *Civil Code of Québec*, while the law adequately covers most types of abuse, the provisions are not always effective for several reasons. Firstly, legal aid in civil matters is not available in all Canadian provinces. When considerable property has been stolen or appropriated by third parties, it is important that the elderly who want to invoke the provisions available to them under common law or the *Civil Code of Québec* be able to do so. Thus, (1) legal aid in civil matters should be available in all provinces to elderly persons who want to demand their rights in court following an act of abuse against them. (2) In the absence of legal aid, social services should see that the offenders are prosecuted, notably in cases of financial exploitation. The legislative provisions making it mandatory for children to support their parents may be used as the foundation stone of such prosecution by social service agencies. (3) Given the lack of legal information the elderly have, there should be a toll-free telephone line to dispense information to older persons who believe they have suffered some form of abuse. (4) The law associations of the common law provinces, notably, should establish stricter rules of conduct to prevent notaries/lawyers from acting for both the elderly person and the children in cases of property transfer and powers of attorney. (5) Finally, the establishment of mediation or other dispute settlement mechanisms should be encouraged to make available to the elderly forums in which they are more at ease than in court.

Given that seniors are most familiar with the values of people from their generation and that preventive and corrective means must not be imposed by outside professional groups, it is imperative that the authorities help seniors' groups organize themselves so that they may provide information and support to seniors who have been victims of any form of violence. It is equally important for the authorities concerned -- police forces, professional groups or companies -- to encourage different initiatives that would counter violence against seniors.

As Gordon (1986) forcefully pointed out, systematic enforcement of the provisions of the *Criminal Code* is less appealing to the State than the adoption of elder protection laws, because of the fear of a demographic crisis and economic problems, even though the provisions of the *Criminal Code* better respect the rights of the elderly. It must be ackowledged, however, along with Gordon, that while the systematic application of the *Criminal Code* would be more fair, it might also prove more costly to the State. It is high time to stop using social discourse to convey a positive image of the State while depriving the elderly of their rights. Rather, it must be insisted that abusers and exploiters be prosecuted and made to pay, rather than doubly victimize the elderly. In any event, the elderly are increasingly demanding the same respect as all other Canadians.

## SUMMARY OF RECOMMENDATIONS

### Recommendations pertaining to the relevance of the law

1. In general, provisions of laws currently in effect are adequate to the task of protecting seniors from different forms of violence without the government having to adopt special laws regarding neglected adults, as has been done in the Atlantic provinces.

2. Supervisory provisions that state when proxies who are given power of attorney in instances of disability may begin passing of accounts are similar to those in effect in the United Kingdom and Alberta, and may finally limit the ability of proxies to financially exploit seniors.

3. Laws should be modified, namely in New Brunswick and Prince Edward Island, to protect both the rights of seniors and the entire population with regard to power of attorney in instances of disability, to ensure that patients' wishes are respected by medical personnel.

4. The rights of seniors living in long-term residential facilities could be better protected by adopting legislation that is similar to the Ontario law prescribing the care given to seniors living in health-care facilities.

5. The rights of seniors and those of the general population with regard to privacy and personal lives could be assured by adopting provisions similar to those applied in Québec, or, at the very least, those in effect in the Western provinces.

### Recommendations regarding the efficiency of penal law

6. Provisions in the Canadian *Criminal Code* adequately cover all forms of violence except neglect. The problem is uncertainty about applying the law. First, our society is at the stage where it views violence against seniors the same way it viewed violence against women in 1980. Since physical abuse against seniors is in fact domestic violence, the methods implemented in the mid-1990s to stop domestic violence must be used.

7. Steps similar to those used to stop domestic violence must be employed to counter different forms of violence against seniors.

8. A clear and direct policy must be established by politicians and those responsible for enforcing the law.

9. A widespread program to educate the public about the different forms of violence against seniors must be developed.

10. Training programs should also be prepared for police forces, or at least for those groups who specialize in working with seniors.

11. Protocols regarding complaints about the different forms of violence against seniors should be given to those who respond to such complaints, mainly the police and Crown prosecutors.

12. As seniors are hesitant about using traditional legal procedures, it is necessary to completely enforce the section 717 of the *Criminal Code*, which authorizes the application of alternative measures.

**Recommendations regarding the efficiency of common law and civil law**

13. Legal Aid is not provided in all provinces for civil proceedings. When valuable property is stolen or seized by a third party, it is important that seniors who wish to assert their rights, as set out in the common law or Québec civil law, can do so. Legal Aid should be provided by all provinces in such instances, so as to allow seniors the opportunity to seek redress before the courts following an act of violence.

14. If Legal Aid is not available, social service agencies should be responsible for taking the aggressors to court, especially when a senior's finances have been exploited. Legislative provisions that force children to provide for their parents' needs can serve as a starting point in legal proceedings undertaken by social service agencies.

15. Given the lack of legal information for seniors, a toll-free telephone number should be made available to allow seniors to obtain information if they think they are victims of any form of violence.

16. The Bars of all provinces, especially those provinces using common law, should impose more severe rules in their code of ethics to prevent notaries from representing both the parents and children when signing acts of transfer of ownership and for powers of attorney.

17. Encourage mediation and alternative measures as options for seniors who would feel more comfortable using these methods to resolve problems instead of going before the courts.

**General recommendations regarding the participation of seniors**

18. It is imperative that the authorities help seniors' groups organize themselves so that they may provide information and support to seniors who have been victims of any form of violence.

19. It is equally important for the authorities concerned -- police forces, professional groups or companies -- to encourage different initiatives that would counter violence against seniors.

## BIBLIOGRAPHY


Arnaud, A.-J. (1988). «Liberté», dans *Dictionnaire encyclopédique de théorie et de sociologie du droit* (p. 228- 229). Paris, Librairie générale de droit et de jurisprudence.

Ashton, G. R. (1995). *Elderly people and the law*, London, UK: Butterworths.

Atias, C. (1985). *Les personnes. Les incapacités*, Paris, Presses universitaires de France.

Babbie, E. (1995). *The practice of social research*, 7th ed. Belmont, CA: Wadsworth Publishing Co.

Baccouche, N. (1982). «L'imagination pratique sous le régime du service social», *Revue de l'Université de Moncton*, vol. *15*, no. 1, p. 205-235.

Badinter, E. (1980). *L'amour en plus : histoire de l'amour maternel (XVIIe-XXe siècle)*, Paris, Flammarion.

Baron, S. & Welty, A. (1996). "Elder abuse", *Journal of Gerontological Social Work*, *25* (1-2), 33-57.

Bartlett, H.M. (1970). *The Common Base of Social Work Practice*, Washington, National Association of Social Work Inc.

Baudouin, J.-L. (1993) *Les obligations*, 4e éd., cowansville,QC, Éditions Yvon Blais Inc.

Baudouin, J.-L. et Deslauriers, P. (1998). *La responsabilité civile*, 5e éd., Cowansville, QC, Éditions Yvon Blais Inc.

Beaulieu, M. (1994). "Réagir face aux mauvais traitements en institution : une responsabilité individuelle et collective", *Le Gérontophile*, *16* (4), 35-40.

Beaulieu, M., Gravel, S. & Lithwick, M. (1999, février). "Older adult mistreatment: Dynamics in personal relationships", *Gerontology Research Centre News (Simon Fraser University)*, *17* (4), 8-10.

Bélanger, A., Dumas, J., Oikawa, C. & Martel, L. (1998). "Effets de l'entourage des personnes âgées sur leur condition socio-économique". *Rapport sur l'état de la population du Canada 1997. La conjoncture démographique*, Ottawa, Statistique Canada.

Bélanger, L., Darche, T., De Ravinel, H., et Grenier, P. (1981). «Rapport du comité violence et personnes âgées», *Les Cahiers de l'Association québécoise de gérontologie*, *1*, 1-99.

Belley, J.-G. (1986). «L'État et la régulation juridique des sociétés globales. Pour une problématique du pluralisme juridique» *Sociologie et Sociétés*, vol. *18*, no 1, p. 11-32.

Belley, J.-G. (1998). "Le pluralisme juridique de Roderick Macdonald : une analyse séquentielle", dans A. Lajoie, R.A. Macdonald, R. Janda et G. Rocher (sous la direction de), *Théories et émergence du droit : pluralisme, surdétermination et effectivité* (pp. 57-68), Montréal/Bruxelles, Éditions Thémis/Bruylant.

Bergmann, K. (1980). «Dementia : Epidemiological aspects», dans G. Barbagallo-Sangiorgi et A.N. Exton-Smith (sous la direction de), *The Aging Brain: Neurological and Mental Disturbances* (p. 59), New York, Plenum Press.

Bickmann, L., & Rog, D. J. (1998). *Handbook of applied social research methods*, Thousand Oaks, CA, Sage Publications.

Blunt, A. P. (1993). "Financial exploitation of the incapacitated: Investigation and remedies", *Journal of Elder Abuse & Neglect*, 5(1), 19-32.

Bond, J. B. & Penner, R.L. (1995). "Perceived effectiveness of legislation concerning abuse of the elderly: A survey of professionals in Canada and in the United States", *Canadian Journal on Aging*, *14* (sup 2), 118-135.

Bourland, M.D. (1990). "Elder abuse: from definitio to prevention", *Postgrad. Med.* 87(2), 139-144.

Bunge, V. P. & Levelt, A. (1998), *La violence familiale au Canada: un profil statistique 1998*, Ottawa, Centre canadien de la statistique juridique, 25-27.

Burns, T. R., Baumgartner, T., & Deville, P. (1985),*Man, decisions, society. The theory of actor-system dynamics for social scientists*, New York, NY, Gordon and Breach science Publishers.

Burns, T. R., & Dietz, T. (1992). "Cultural evolution: social rule systems, selection, and human agency", *International Sociology*, 7(3), 259-283.

Burns, T. R., & Flam, H. (1987). *The shaping of social organization*, Beverly Hill, CA, Sage.

Campbell, J.C. (1989). A rest of two explanatory models of women's response to battering. Nursing Research, 38, 18-24.

Carniol, B. (1984). «Clashes of ideologies in social work education», *Canadian Social Work Review*, p. 184-199.

Castel, R. (1981). *La gestion des risques, de l'anti-psychiatrie à l'après-psychiatrie*, Paris, Les Éditions de Minuit.

Cave, R. (1999, 7 Janvier ). "Broken trust divides family", *Telegraph Journal[St-John]*, A1.

Cohen, S. (1985). *Vision of Social Control*, Cambridge, Polity Press.

Commaille, J. (1986). «D'une sociologie de la femme à une sociologie du droit: d'une sociologie du droit à une sociologie des régulations sociales», *Sociologie et Sociétés*, vol. *18*, no. 1, p. 113-128.

Commaille, J. et Perrin, J.F. (1985). «Le modèle de Janus de la sociologie du droit», *Droit et Société: Revue internationale de théorie du droit et de sociologie juridique*, vol. *1*, p. 95-110.

Compton, B.R. et Galaway, B.(1975). *Social Work Processes*, Illinois, The Dorcey Press.

Côté, R. et Rocher, G. (1994). «Introduction», dans R.Côté et G. Rocher (sous la direction de), *Entre droit et technique: enjeux normatifs et sociaux* (p. 1-36), Montréal : Éditions, Thémis Inc.

Coughlan, S.G., Downe-Wamboldt, B., Elgie, R.G., Harbison, J., Melanson, P. M. & Morrow, M. (1995). *Mistreating elderly people: Questioning the legal resoponse to elder abuse and neglect. Vol. 2: Legal responses to elder abuse and neglect*, Halifax, N.S., Dalhousie University Health Law Institute.

Cruikshank, D.A. (1981). «Court avoidance in child neglect cases», dans H.H. Irving (sous la direction de), *Family Law: An Interdisciplinary Perspective* (p. 143-167), Toronto, Carswell.

Day, P.R. (1981). *Social Work and Social Control*, London, Tavistock Publications.

De Soussa Santos, B. (1985). "On modes of production of law and social power", *International Journal of the Sociology of Law*, *13*, 299-336.

De Soussa Santos, B. (1988). "Droit: une carte de la lecture déformée. Pour une conception post-moderne du droit", *Droit et Société*, *10*, 363-

Denzin, N.K. & Lincoln, Y.S. (Eds). (1994). *Handbook of qualitative research.*,Thousand Oaks, CA, Sage Publications.

Des Rosiers, N. et Langevin, L. (1998). *L'indemnisation des victimes de violence sexuelle et conjugale*, Cowansville, QC, Éditions Yvon Blais Inc.

Dingwall, R, Eekelaar, J. et Murray, T. (1983). *The Protection of Children : State Intervention and Family Life*. Oxford, Basil Blackwell.

Donzelot, J. (1977). *La police des familles*, Paris, Les Éditions de Minuit.

Duplantie, J.P. et Robichaud, J.-B. (1976, automne). «La socialité par les services sociaux spécialisés» *Intervention*, vol. *47*, p. 3-19.

Dow-Pittaway, E. & Westhues, A. (1993). "The prevalence of elder abuse and neglect of older adults who access health and social services in London, Ontario, Canada", *Journal of Elder Abuse & Neglect*, *5*(4), 77-93.

Dow-Pittaway, E., Westhues, A. & Peressini, T. (1995). "Rish factors for abuse and neglect among older adults", *Canadian Journal on Aging*, *14*(sup.2) 20-44.

Eisenberg, H. B. (1991). "Combatting elder abuse through the legal process", *Journal of Elder Abuse & Neglect*, *3*(1), 65-96.

Ehrlich, E. (1975). *Fundamental Principles of the Sociology of Law* (traduit de l'allemand par Walter L. Molh), New York,: Arno Press.

Ewald, F. (1986). *L'État-providence*, Paris, Grasset.

Fattah, E.A. et Sacco, V.F. (1989). *Crime and victimization of the elderly*, New York, Springer Verlag.

Faulkner, L.R. (1982). «Mandating the Reporting of Suspected Cases of Elder Abuse : An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults», *Family Law Quaterly*, vol. *16*, p. 69-91.

Foucault, M. (1975). *Surveiller et punir : naissance de la prison*, Paris, Gallimard.

Fram, S.V. (1987). *Final Report of the Advisory Committee on Substitute Decision Making for the Mentally Incapable Persons*, Toronto, Attorney General.

Gamache, B. et Milette, S. (1987). «La personne âgée et l'exercice des droits reliés à sa personne», dans *Les personnes âgées et le droit* (p. 71-195). Prix Charles-Codère, Cowansville, Éditions Yvon Blais Inc.

Gelles, R.J. (1985). «Family Violence», *Annual Review of Sociology*, vol. *11*, p. 347367.

Gelles, R.J. et Straus, M.A. (1988). *Intimate Violence : The Causes and Consequences of Abuse in the american Family*, New York, Simon & Schuster.

Girard, P. (1988). «Elder abuse and its impact on hospital social work», dans B. Schlesinger et R. Schlesinger (sous la direction de), *Abuse of the Elderly : Issues and Annotated Bibliography* (p. 43-56). Toronto, University of Toronto Press.

Giroux-Gareau, E. et Manuel, S. (1999). "La protection des aînés contre l'exploitation économique par leurs descendants: droit des contrats en droit civil et en common law", Travail étudiant présenté au concours du prix PAJLO 1999.

Gordon, R. M. (1986). "Financial abuse of the elderly and state "protecive services": Changing strategies in the penal-wlfare comples in the United States and Canada", *Crime and Social Justice, 26*, 116-134.

Gordon, R. M. (1995). "Adult guardinaship and adult protection legislation inCanada: Recent reforms and future problems", *Canadian Journal on Aging, 14* (Suppl. 2), 89-102.

Gordon, R. M. et Verdun-Jones, S.N. (1992, mise à jour). *Adult Guardianship Law in Canada*, Toronto, Carswell.

Gordon, R., Verdun-Jones, S.N. et MacDougall, D.J. (1987). «Reforms in the Field of Adult Guardianship Law: A Comment on Recent Developments», *Revue cananadienne de Droit de la famille*, vol. 6, p. 149-154.

Grawitz, M. (1996). *Méthodes des sciences sociales*, 10e éd. Paris, FR, Dalloz.

Guba, E. G. & Lincoln, Y. S. (1989). *Fourth generation evaluation*, Newbury Park, CA, Sage Publications.

Gurvitch, G. (1968). *Traité de sociologie*, 3e éd., tome II, Paris, Presses universitaires de France.

Haba, E. (1988). «Rationalité», dans *Dictionnaire encyclopédique de théorie et de sociologie du droit* (p. 337-340). Paris, L.G.D.J.

Hall, G. H. (1971). «Protective Services for Adults», dans *Encyclopedia of Social Work*, vol. 2, New York, National Association of Social Workers.

Hankin, M. B. (1996). "Making the perpetrators pay: Collecting damages for elde abuse, neglect and exploitation", *Aging Magazine, 367*, 66-73.

Hickey, G.F. (1981). *A Systems Approach to Service Delivery*, Fredericton (N.-B.), ministère des Services sociaux.

Hortsman, P.M. (1975). «Protective Services for the Elderly: The Limits of Parens Patriae», *Missouri Law Revue*, vol. 40, p. 215-279.

Hughes, M.E. (1989). «Personal Guardianship and the Elderly in the Canadian Common Law Provinces: An Overview of the Law and Charter Implications», dans J. Eekelaar et D. Pearl (sous la direction de), *An Aging World : Dilemmas and Challenges for Law and Social Policy* (p. 617-634), Oxford, Clarendon Press.

Knodt, E.M. (1995). "Forward", dans N. Luhmann (tranduit par J. Bednarz & D. Baecker). *Social systems*, (pp. ix-xxxvi). Stanford, CA. Stanford University Press.

Kivela, S.L. (1992). "Abuse in old age - epidemiological data from Finland", *Journal of Elder Abuse & Neglect*, *4*(3), 1-18.

Krauskopf, J.M. et Burnett, M.E. (1983). «When Protection Becomes Abuse», *Trial*, vol. *19*, p. 60-67.

Kurrle, S.E, Sadler, P.M. & Cameon, I.D. (1992). "Elder Abuse - Patterns of elder Abuse.", *Med. J. Aust 157*(10), 673-676

Laforest, J. (1984, décembre). «La nature du service social, deuxième partie: la formation des travailleurs sociaux», *Intervention*, vol. *70*, p. 11-20.

Langan, J. & Means, R. (1996). "Financial management and elderly people with dementia in the U.K.: As much a question of confusion as abuse?", *Ageing and Society*, *16*, 287-314.

Lasemann, F. (1979, automne). «Les structures du pouvoir comme détermination des pratiques», *Interventions*, vol. *56*, p. 48-51.

LeFrançois, R. (1995). "Pluralisme méthodologique et stratégies multi-méthodes en gérontologie", *Canadian Jouranl on Aging/Revue canadienne du vieillissement*, *14*(supp. 1), 52-67.

Legendre, R. (1988). *Dictionnaire actuel de l'éducation*, Paris/Montréal, Librairie Larousse.

Lewin, T. (1996, June 2). "Ignoring 'Right to die' directives, medical community is being sued", *New York Time*,1,28.

Linden, A.M. (1997). *Canadian Tort Law*, Toronto, ON, Butterworths.

Luhmann, N. (1983). "Insistence on systems theory: Perspectives from Germany - an essay", *Social Forces*, *61*:4, 987-998.

Luhmann, N. (1985). *A sociological theory of law*, London, UK, Routledge & Kegan Paul.

Luhmann, N. (1995). *Social systems* (traduit par J. Bednarz & D. Baeche). Stanford, CA, Stanford University Press.

Macdonald, R. A. (1998). "Critical legal pluralism as a construction of normativity and the emergence of law", dans A. Lajoie, R. A. MacDonald, R. Janda et G.Rocher (sous la direction de), *Théories et émergence du droit : pluralisme, surdétermination et effectivité* (pp. 9-23). Montréal/Bruxelles, Éditions Thémis/Bruylant.

Massip, J. (1983). *La réforme du droit des incapables majeurs*, tome I, 4e éd., Paris, Répertoire du notariat defrénois.

Mayrand, A. (1975). *L'inviolabilité de la personne humaine*, Montréal, Wilson & LaFleur Ltée.

McDaniel, S. A.(1997). "Intergenerational transfers, social solidarity, and social policy: Unanswered questions and policy challenges", *Canadian Journal on Aging/Canadian Public Policy Supplement, 16*(supp.), 1-21.

MacDonald, L., Hornick, J.P., Robertson, G.B. et Wallace, J.E. (1990). *Elder Abuse and neglect in Canada*, Toronto, Butterworth.

McLaughlin, P. (1979). *Guardianship of the Person*, Downsview (Ont), National Institute on Mental Retardation.

Nadien, M. B. (1995). "Elder violence (maltreatment) in domestic settings: Some theory and research", dans L. Loeb-Adler & F. L. Denmark (Eds.). *Violence and the prevention of violence* (pp. 177-190), Westport, CT: Praeger.

Neale, A.V. Hwalek, M. A., Goodrich, C. S. & Quinn, K. M. (1996). "The Illinois elder abuse system: Program description and administrative findings", *The Gerontologist, 36* (4), 502-511.

Oakar, M.R. et Miller, C.A. (1983). «Federal Legislation to Protect the Elderly», dans J.I. Kosberg (sous la direction de), *Abuse and Maltreatment of the Elderly : Causes and Interventions* (p. 422-435), Littleton (Mass), John Wright PSG Inc.

Ogg, J. (1993). "Researching elder abuse in Britain", *Journal of Elder Abuse & Neglect, 5*(2), 37-54

Okun, M.A., Olding, W.W., & Cohn, M.G. (1990). "A méta-analysis of subjective well-being interventions among elders", *Psychological Bulletin, 108*(2), 257-266.

O'Malley, Segars, H., Perez, R., Mitchell, V. et Kneupfel, G.M. (1984). «Elder Abuse in Massuchusetts: A Survey of Professionals and Paraprofessionals», dans J. J. Costa (Ed).

*Abuse of the Elderly: A Guide to Resources and Services* (p. 57-95), Toronto, Lexington Books.

Patton, M. Q. (1990). *Qualitative evaluation and research methods*, 2e ed., Newbury Park, CA, Sage Publications.

Pillemer, K., & Finkelhor, D. (1988). "The prevalence of elder abuse: A random sample survey", *The Gerontologist*, *28*, 51-57

Podnieks, E. & Pillemer, K. (1990). *National Survey on Abuse of the Elderly in Canada*, Toronto, Ryerson Polytechnical Institute.

Poirier, D. (1984). «Le libre consentement des personnes âgées à des actes translatifs de propriété en faveur de parents», *University of New Brunswick Law Journal*, vol. *33*, p. 296-309.

Poirier, D. (1986). «Social worker enforcement of child welfare legislation: An increasing potential of abuse of power», *Canadian Journal of Family Law*, vol. *5*, *no.* 2, p. 215-235.

Poirier, D. (1988). «Models of intervention for the guardianship and protection of elderly persons in Canada», dans M. E. Hughes, et E.D. Pask (sous la direction de), *National Themes in Family Law* (p. 157-178), Toronto, Carswell.

Poirier, D. (1990). "Le rôle des avocats-notaires dans la prévention de l'exploitation économique des personnes âgées par des actes translatifs de propriété intra-familiaux", *Bulletin des Avocats du Nouveau-Brunswick*, *6*(2), 11-13.

Poirier, D. (1991). «La protection juridique des personnes âgées ou handicapées et la Charte canadienne des droits et libertés», *Revue de droit d'Ottawa*, vol. *23*, p. 553-579.

Poirier, D. (1992). «L'exploitation économique des personnes âgées : étude de cas», dans G. Létourneau (sous la direction de), *Aider ses parents vieillissants. Un défi personnel, familial, politique, communautaire* (p. 201-210), Montréal, Association québécoise de gérontologie.

Poirier, D. (1993). *La protection juridique des personnes âgées. Étude socio-juridique comparée du Nouveau-Brunswick et des provinces canadiennes*. Thèse de doctorat, Faculté de droit, Université de Montréal.

Poirier, D. (1995). "L'analyse des dossiers judiciaires du Nouveau-Brunswick en matière de protection des personnes âgées", *Canadian Journal on Aging/Revue canadienne du vieillissement*, *14* (suppl. 2), 103-117.

Poirier, D. (1997). *Au nom de la loi, je vous protège! La protection juridique des aînés au Nouveau-Brunswick et au Canada*. Moncton, Éditions d'Acadie.

Poirier, D. & Thériault, G. (1993). "Les normes juridiques et administratives en matière de droits des résidents de foyers de soins", *Canadian Journal on Aging, 12*(1), 16-32.

Poirier, N. (Sous presse). "Treatment of Terminally Ill Older Patients Against Their Will: A Form of Elder Abuse and Abuse of Power", *Proceedings of the Second Conference on Elder Abuse and Neglect*. Toronto, ON, Institute for Human Development, Life Course and Aging.

Popper, K.R. (1968). *Conjectures and refutations : the growth of scientific knowledge*. New York: Harper and Row.

Price, G. & Fox, C. (1997). "The Massachusetts bank reporting project: An edge against elder financial exploitation", *Journal of Elder Abuse & Neglect, 8*(4), 59-71.

Québec. (1989). *Vieillir en toute liberté... Rapport du comité sur les abus exercées à l'endroit des personnes âgées*, Québec, Ministère de la Santé et des Services sociaux.

Regan, J.J. (1972). «Protective Services for the Elderly: Commitment, Guardianship, and Alternatives» *William & Mary Law Revue*, vol. *13*, p. 569-622.

Regan, J.J. (1981). «Protecting the Elderly: The New Paternalism», *Hasting Law Journal,vol. 32*, p. 1111-1132.

Renaud, G. (1978). *L'éclatement de la profession en service social*, Montréal, Les éditions coopératives Albert St-Martin.

Robertson, G. B. (1994). *Mental disability and the law in Canada*, 2e éd., Toronto, Carswell.

Robertson, G. B. (1995). "Legal approaches to elder abuse and neglect in Canada". In M. J. MacLean (Ed.). *Abuse & Neglect of Older Canadians : Strategies for Change* (pp.55-62). Toronto, Thomson Canadian Publishing.

Rocher, G. (1988). «Pour une sociologie des ordres juridiques», *Cahiers de droit, 29*, 91-120.

Rocher, G. (1996). *Études de sociologie du droit et de l'éthique*, Montréal, QC, Les Éditions Thémis.

Rocher, G. (1998). "L'effectivité du droit", dans A. Lajoie, R. A. MacDonald, R. Janda et G. Rocher (sous la direction de), *Théories et émergence du droit : pluralisme, surdétermination et effectivité* (pp. 133-149). Montréal/Bruxelles, Éditions Thémis/Bruylant.

Rowe, J., Davies, K. N. Baburaj V., Sinha, R.N. (1993). "F.A.D.E. A.W.A.Y. - The financial affairs of dementing elders and who is the attorney?", *Journal of Elder Abuse & Neglect*, 5(2), 73-79.

Sacks, D. (1996). "Prevention of financial abuse, focus of new Institute at Brookdale Center on Aging", *Aging Magazine, 367*, 86-89.

Sanchez, Y. M. (1996). "Distinguishing cultural expectations in assessment of financial exploitation", *Journal of Elder Abuse & Neglect*, 8(2), 49-59.

Satyamurti, C. (1979). «Care and contgrol in local authority social work», dans M. Rustin et C. Satyamurti (sous la direction de), *Social Work, Welfare and the State* (p. 89-96), London, Edward Arnorl.

Schmidt, W. C. (1993). "Accountability of lawyers in serving vulnerable, elderly clients.", *Journal of Elder Abuse & Nelect*, 5(3), 39-51.

Schmidt, W.C., Miller, K.G., Bell, W.G. et New, B.E. (1981). *Public Guardianship and the Elderly*, Cambridge (Mass ), Ballinger Publishing Co.

Sengstock, M. C. & Barrett, S. (1986). "Elderly Victims of family abuse, neglect and malreatment: Can legal assistance help?", *Journal of Gerontological Social Work*, 9(3), 43-61.

Shadish, W. R., Cook, T. D., & Leviton, L. C. (1991). *Foundations of program evaluation: Theories of practice*, Newbury Park, CA, Sage Publications.

Sharpe, G. (1983-84). «Guardianship: Two Models for Reform», *Health Law in Canada*,vol. *4*, p. 13-23.

Shell, D. (1982). *Protection of Elder Abuse*, Winnipeg, Manitoba Council on Aging.

Snell, J. G. (1990). "Filial responsibility law in Canada: An historical study", *Canadian Journal on Aging*, 9(3), 268-277.

Sijuwade, P.O. (1995). "Cross-cultural perspectives on elder abuse as a family dilemma", *Social Behavior and Personality*, *23*(3), 247-252.

Spencer, C. (1996). *Diminishing returns. An examination of financial responsibility, decision-making and financial abuse among older adults in British Columbia*, Vancouver: Gerontology Research Centre, Simon Fraser University.

Stark, E., Flitcraft, A. & Frazier, W. (1979). Medicine and patriarchal violence : the social construction of a "private"event. Inter. J. Hlth Serv., 9, 461-493.

Stake, R. E. (1995). *The art of case study research*, Thousand Oaks, CA, Sage Publications.

Statistiques Canada. (1998). *La violence familiale au Canada: un profil statistique*, Ottawa, Centre canadien de la statistique.

Steinberg, R. M. (1985). *Alternative approaches to conservatorship and protection of older adults referred to public guardian*, Andrus Gerontology Center.

Stevenson, C. (1985). *Family Abuse of the Elderly in Alberta*, Alberta, Senior Citizens Bureau, Social Services and Community Health.

Teno, J. M., Licks, S., Lynn, J., Wenger, N., Phillips, R. S., Murphy, D. P., Connors, A. F, Desbiens, N., Fulkerson, W. J., Bellamy, P., & Knaus, W. A. (1997a). "Advance directives for seriously ill hospitalized patients: effectiveness with the patient Self-Determination Act and the SUPPORT intervention", *Journal of American Geriatric Society*, *45*(4), 500-507.

Teno, J. M., Licks, S., Lynn, J., Wenger, N., Connors, A. F., Phillips, R. S., O'Connor, M. A., Murphy, D. P., Fulkerson, W. J., Desbiens, N., & Knaus, W. A. (1997b). "Do advance directives provide instructions that direct care?", *Journal of American Geriatric Society*, *45*(4), 508-512.

Vida, S. (1994). "An update on elder abuse and neglect", *Can J. Psychiatry*, *39*(8, sup.1), s34-s40.

Vanderlinden, J. (1993). "Vers une nouvelle conception du pluralisme juridique", 18 *Revue de la recherche juridique - Droit prospectif*, 573- .

Vanderlinden, J. (1998). "Dialogue d'un ingénu et d'un opromeneur solitaire en guise de synthèse générale d'un colloque de thé.orie du droit", dans A. Lajoie, R. A. MacDonald, R. Janda et G. Rocher (sous la direction de), *Théories et émergence du droit : pluralisme, surdétermination et effectivité* (pp. 201-266). Montréal/Bruxelles, Éditions Thémis/Bruylant.

Waddams, S.M. (1993). *The law of contracts*, 3e éd., Toronto, Canada Law Book.

Walker, L. (1983). The battered woman syndrome study. In D. Finkelhor, R. Gelles, G. Hotaling, & M. Strauss (Eds.). The dark side of families (pp. 31-49). Beverly Hillls, CA: Sage Publications.

Weber, M. (1986). *Sociologie du droit* (traduit par J. Grosclaude). Paris, Presses universitaires de France.

Weiler, K. (1989, August). "Financial abuse of the elderly: Recognizing and acting on it", *Journal of Gerontological Nursing, 15*(8), 10-15.

Wilber, K. H. (1990). "Material abuse of the elderly: When is guardianship a solution?", *Journal of Elder Abuse & Neglect*, 2(3/4), 89-104.

Wilber, K. H. (1991). "Alternative to conservatorship: The role of daily money management services", *The Gerontologist, 31*(2), 150-155.

Wilber, K.H. & Reynolds, S.L. (1996). "Introducing a framework for defining financial abuse of elderly", *Journal of Elder Abuse & Neglect*, 8(2), 61-80.

Wilson, D.M. (1996). "Highlighting the role of policy in nursing practice through a comparison of DNR policy influences and no CPR decision influences", *Nursing Outlook, 44* (6), 272-279.

Woodward, A.E., Ellig, J. & Burns, T. R. (1994). *Municipal entrepreneurship and energy policy: A five nation study of politics, innovation and social change*, Langhorne, PA, Gordon and Breach Science Publishers S.A.

Yin, R. K. (1994). *Case study research: Design and methods*, 2e ed., Beverly Hills, CA, Sage Publications.

Yin, R. K. (1998). "The abridged version of case study research: Design and method", dans L. Bickman & D.J. Rog (sous la direction de), *Handbook of applied social research methods*, (pp. 229-259), Thousand Oaks, CA, Sage Publications.

Zuzga, C. A. (1996). "Challenges in prosecuting elder abuse", *Aging Magazine, 367*, 76-79.

## LIST OF LEGISLATIVE SOURCES


*Adult Guardianship Act*. (1993). S.B.C. 1993, c. 35.

*Adult Protection Act*. (1985). S.N.S. 1985, c. 2.

*Adult Protection Act*. (1988). S.P.E.I., 1988, c. 6.

*Advance Health Care Directives Act*. (1995). S. Nfld 1995, c. A-4.1.

*Canadian Charter of Rights and Freedoms*. (1982). Part I of the *Constitution Act, 1982*, Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

*Civil Code of Québec*. (1999). Cowanswille, Éditions Yvon Blais Inc.

*Criminal Code*. (1985). R.S.C. 1985, c. C-46.

*Dependant Adults Act*. (1976). S.A. 1976, c. 63, now referenced as R.S.A. 1980, c. D-32.

*Dependant Adults Act*. (1989). S.S. 1989, c. D-25.1.

*Incompetent Persons Act*. (1989). R.S.N.S. 1989, c. 218.

*Vulnerable Persons Living with a Mental Disability Act*. (1993). S. M. 1993, c. 29.

*An Act to provide for the making of Decisions of behlaf of Adults concerning the Management of their Property and concerning their Personal Care*. (1992). S. O. 1992, c. 30.

*Guardianship and Trusteeship Act* (1994). R.S.N.W.T. 1994, c. 29.

*Nursing Homes Act*. (1990). R.S.O. 1990, c. N-7.

*Infirm Persons Act*. (1973). R.S.N.B. 1973, c. I-8.

*Family Services Act*, (1980). S.N.B., 1980, c. C-2.1, referenced as S.N.B. 1980, c. F-2.2 since 1983.

*Mental Health Act*. (1988). R.S.P.E.I. 1988, c. M-9.

*Neglected Adults Welfare Act*, (1973). S.N. 1973, no. 81.

*Power of Attorney Act*. (1991). S.A. 1991, c. P-13.5.

*Power of Attorney Act*. (1988). S.N.S. 1988, c. 17.

## LIST OF CASES

*Aubrey* v. *Éditions Vice -Versa Inc.* [1998] 1 S.C.R. 591.

*Casford, Re* (1983), 43 N'fld & P.E.I.R. and 127 A.P.R. 240 (P.E.I.S.C.).

*Cole* v. *Turner* (1704), 6 Mod. 149.

*Dobson* v. *Dobson*, [1997] NBJ # 17 upheld by the Court of Appeal [1997] NBJ #232, reversed by the Supreme Court of Canada [1999]

*Eve, Re*, [1986] 2 S.C.R. 388.

*Gammon et al.* v. *Steeves et al.* (1988), 83 N.B.R. (2d) 397 (N.B. C.A.).

*Goguen* v. *Goguen* (1992), 92 N.B.R. (2d) 158 (N.B.C.B.R.).

*Fleming* v. *Reid* (1991), 28 A.C.W.S. (3d) 238 (Ont. C.A.) reversing 21 A.C.W.S. (3d) 121.

*K.M.* v. *K. M.*, [1992] 3 S.C.R. 6.

*Kletke* v. *U.(D.)* (1990), 17 A.C.W.S. (3d) 336 (Ont. Dist. Ct.).

*Lévesque* v. *Ouellet*, [1990] R.J.Q. 2607 (S.C.).

*Mallette* v. *Shulman* (1990), 72 O. R. (2d) 417 (Ont. C.A.).

*Nancy B.* v. *Hôtel-dieu de Québec*, [1992] R.J.Q. 361 (C.S.Q.).

*Nova Scotia (Minister of Community Services)* v. *Burke* (1989), 93 N.S.R. (2d) 413 (N.S. Fam. Ct.).

*Nova Scotia (Minister of Community Services)* v. *J.G.* (1986), 73 N.S.R. (2d) and 176 A.P.R. 203 (N.S. Fam. Ct.).

*Nova Scotia (Minister of Community Services)* v. *L.L.* (1991), 98 N.S.R. (2d) and 263 A.P.R. 361 (N.S. Fam. Ct.).

*Nova Scotia (Minister of Community Services)* v. *Perry* (1991), 98 N.S.R. (2d) and 263 A.P.R. 423 (N.S. Fam. Ct.).

*R.* v. *Adler*, [1999] N.B.J. # 100 (C.A.N.B.).

*R.* v. *Arnold*, [1994] B.C.J. # 2183 (B.C.C.A.).

*R.* v. *Caron (L.)* (1996), 143 Sask. R. 292 (Sask. Q.B.).

*R.* v. *Donald George Langs* (1984), 12 W.C.B. 83 (Ont. Co. Ct.).

*R.* v. *Gallant* (1985), 54 Nfld. & P.E.I.R. 173 (P.E.I.S.C.).

*R.* v. *Hamm*, [1988] B.C.J. # 369 (C.A.B.C.).

*R.* v. *Irvin* (1987), 76 N.S.R. (2d) 61 (C.A.N.S).

*R.* v. *Kribbs* (1967), 2 O.R. 539 (Ont. C.A.).

*R.* v. *Lalonde*, [1985] A.J. # 264 (C.A.A.).

*R.* v. *Lienau* (1986), 68 A.R. 205 (C.A.A.).

*R.* v. *Vanpatter*, [1981] O.J. # 357 (Ont. Co. Ct.).

*Southam Inc.* v. *Hunter*, [1984] 2 S.C.R. 145.

*T.F.* v. *O'Doherty et al.* (1986), 2 A.C.W.S. (3d) 89 (Ont. Dist. Ct.).